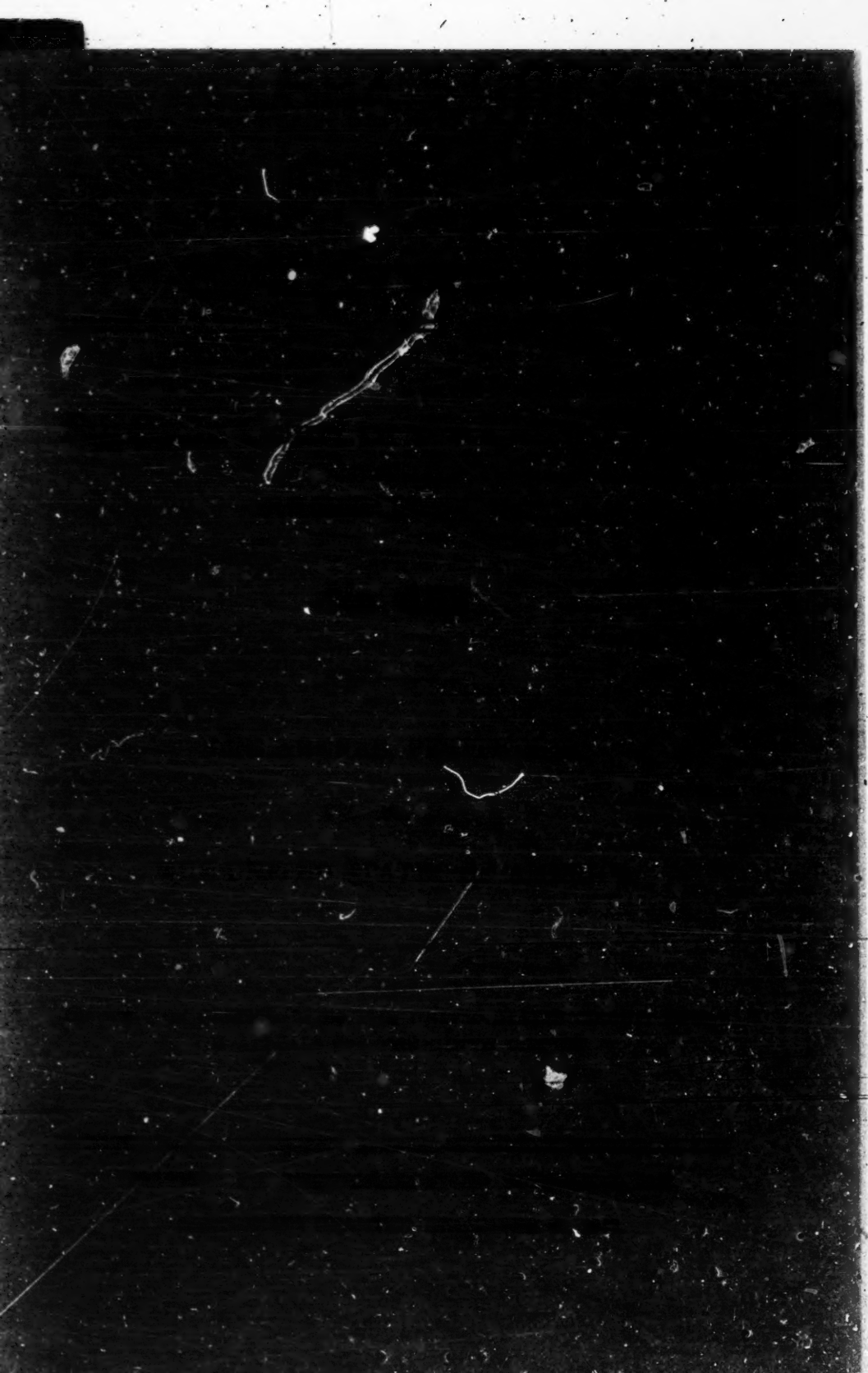

No. 10219

United States
Circuit Court of Appeals
For the Ninth Circuit.

LEE ARENAS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Southern District of California,
Central Division

ROTARY COLORPRINT, 590 FOLSOM, ST., SAN FRANCISCO

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

NAMES AND ADDRESSES OF ATTORNEYS:

For Appellant:

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*Page numbering appearing at foot of page of original certified Transcript of Record.

In the District Court of the United States For the Southern District of California, Central Division.

No. 1321 O'C—Civil

LEE ARENAS,

Plaintiff,

v.

THE UNITED STATES OF AMERICA,

Defendant.

SECOND AMENDED COMPLAINT

The complainant, by permission of the Court, respectfully presents this, his Second Amended Complaint here, and complains and alleges, to wit:

I.

That he is and, at all times herein mentioned, was a citizen of the United States of America and of the State of California; a full blood American Indian of the Agua Caliente, or Palm Springs, Band of Mission Indians of California; of age, and a duly and regularly enrolled and recognized member of said Agua Caliente, or Palm Springs, Band of Mission Indians of California. That he was born upon the Palm Springs Indian Reservation, within the territorial limits of the United States and is now, and has, during and throughout his entire life, been a resident of and lived upon the said Palm Springs Indian Reservation in the County of Riverside, State of California; that he has now and during

and throughout his entire life has adopted the habits, ways and methods of living of the civilized life; that he has voluntarily taken up, and from the date of his birth, within said limits of said Palm Springs Indian Reservation, has kept and maintained his home and residence separate and apart from any tribe of Indians therein, although he has at all times kept and maintained his tribal relationship, membership and en- [2] rollment in said Agua Caliente, or Palm Springs, Band of Mission Indians; that he is able to read and write the English language; that he is possessed of a degree of education and intelligence above the average of any race; and is and, at all times since February 8, 1887, has been entitled to all of the rights, privileges and immunities of a citizen of the United States of America, and of the heritage of his Indian ancestry.

II.

That the Secretary of the Department of the Interior of the United States of America, acting under and by virtue of the authority of the Act of Congress of January 12, 1891 (26 Stat. L. 712-14) as amended June 25, 1910 (36 Stat. L. 855-65) and March 2, 1917 (39 Stat. L. 976) did, on or about, to wit, the 7th day of June, 1921, determine that, in his opinion, the aforesaid Band of Mission Indians, including complainant, were so far advanced in civilization and had so far adopted the life, habits and ways of civilized life as to be capable of owning and managing land in severalty, and did there-

after cause on H. E. Wadsworth to be appointed a Special Alloting Agent at Large of the United States of America to make, and cause to be made, allotments of land on the Agua Caliente, or Palm Springs, Indian Reservation, to such duly and regularly enrolled Indians of said Band of Mission Indians, and among them your complainant, as made, or might make, selection of the hereinafter described lands, for allotment in severalty to the said respective duly and regularly enrolled members of said Band, and among them your complainant, and to allot, or cause to be allotted, to them, including your Complainant, the respective lands so selected by them, respectively, in severalty.

III.

That on or about June 23, 1923, complainant did make his selection of said lands, and did choose certain parcels of land, including the homesite which then and long prior thereto [3] this complainant had occupied and partially improved as his homesite. That thereupon complainant notified the said H. E. Wadsworth, acting pursuant to his powers and duties as Special Alloting Agent at Large to the California Mission Indians, including said Band of Mission Indians, and thereupon the said H. E. Wadsworth as such Special Alloting Agent at Large, did allot, or cause to be allotted to each of certain duly and regularly enrolled members of the said Agua Caliente, or Palm Springs, Band of Mission Indians, including complainant, the lands so selected by each of them for allotment as aforesaid, and did as evidence thereof prepare

certain Official Allotment Schedules and caused the selections for allotment, aforesaid, to be inscribed on said Special Allotment Schedules in the respective names of the respective members of the said Agua Caliente, or Palm Springs, Band of Mission Indians, making, or who had made, their selection of said Palm Springs Indian Reservation lands for allotment in severalty.

That thereafter the said H. E. Wadsworth, as such Special Alloting Agent at Large, did, as evidence of said respective selections of lands for allotment in severalty by said respective members of said Band of Mission Indians, execute, issue and cause to be executed, issued and delivered to the aforesaid members of said Band of Mission Indians, who had made their selections of lands of said Palm Springs Indian Reservation for special allotment to said respective selectees in severalty, Certificates of Selection as evidence of their respective vested equitable right, title and interest in and to the specific parcels of land so selected by them, and each of them.

IV.

That the said H. E. Wadsworth, as such Special Alloting Agent, did, on the 21st day of June, 1923, issue to this complainant, a Certificate of Selection covering the selection of the particular parcels of said land selected by complainant for allot- [4] ment in severalty to complainant, as aforesaid, and said Certificate did confirm an already and pre-existing equitable right of preemption for entry of said lands and that portion of said specific par-

cels of land theretofore occupied and previously partially improved by this complainant as his homesite, separate and apart of all other members of said Agua Caliente, or Palm Springs, Band of Mission Indians, and did create, recognize and confirm an equitable title vested in this complainant in and to said particular parcels of land, described in said certificate of selection, aforesaid; that said Certificate of Selection for allotment in severalty to this complainant of the aforesaid and hereinafter described specific parcels of land, did authorize and empower complainant to enter upon and take exclusive possession of said specific parcels of land as more fully hereinafter set out and described, and that this complainant did enter upon and take sole and exclusive possession of the lands selected for allotment in severalty by complainant, as aforesaid, together with the buildings and improvements thereon previously erected by this complainant. That said H. E. Wadsworth, as such Special Alloting Agent at Large of the Department of the Interior surveyed and classified, or caused to be surveyed and classified, the lands of said Band of Mission Indians, contained within the limits and boundaries of said Indian Reservation, and did allot to your complainant in severalty pursuant to the terms and provisions of the Acts of Congress, the following lands, to wit:

Parcel (a) Homesite:

Lot 46, Section 14, Township 4 South, Range 4 East, S.B.M., comprising two (2) acres;

Parcel (b) Irrigated:

Tract No. 39, Section 26, Tract No. 39, Sec-

tion 26, Township 4 South, Range 4 East, S.B.M., comprising five (5) acres; and [5]

Parcel (c) Desert:

E ½ SW ¼ N.W. ¼ & SE ¼ NW ¼ NW ¼ & SW ¼ NE ¼ NW¼ Section 26, Township 4 South, Range 4 East, S. B. M., comprising forty (40) acres;

that said lands aggregated forty-seven (47) acres, and all of said parcels of land were then a part of the Agua Caliente, or Palm Springs, Band of Mission Indian Reservation in Riverside County, State of California, and composed and comprised lands which from time immemorial had been occupied, used and controlled by the Agua Caliente, or Palm Springs, Band of Mission Indians and their tribal ancestors and predecessors, under an original title antedating the acquisition of California by the United States of American and under the terms and provisions of the Treaty of Guadeloupe Hidalgo. That said original title existed long prior to the admission of the State of California as a State into the United States of America, and by Executive Orders of the President of the United States of America, dated the 15th day of May, 1876, and the 9th day of September, 1877, was recognized and confirmed by the United States of America. That Patents in Trust issued therefor to the said Agua Caliente, or Palm Springs, Band of Mission Indians, including complainant as an enrolled and recognized member thereof, on the 14th day of May, 1896; the 29th day of October, 1906, the 29th day of March, 1923; and the 5th day of January, 1911,

under and pursuant to said executive orders as aforesaid.

VI.

That the said Patents in Trust created a vested interest in said lands in said Band and every member thereof including complainant, and that thereafter to and until the present date the legal title to the whole of the said segregated lands of the said Agua Caliente, or Palm Springs, Band of Mission Indians, has been and now is vested in the United States of America for the [6] sole and exclusive use and benefit of the said Agua Caliente, or Palm Springs, Band of Mission Indians of California in trust pursuant to and in conformity with the terms and provisions of the said Executive orders of the President of the United States of America, aforesaid, and of the Acts of Congress. That the said Band of Mission Indians and this complainant, as a duly enrolled and recognized member thereof, have at all times and do now maintain their tribal relationship, despite their having adopted the habits and ways of civilized life.

VII.

That as evidence of said selection of and allotment to this complainant of the aforesaid described lands, the Department of the Interior of the United States Bureau of Indian Affairs did issue, execute and deliver to your complainant a Certificate substantially in the following words and figures, to wit:

"5-201

"SELECTION FOR ALLOTMENT

"On Agua Caliente Indian Reservation, 1923.

"This is to Certify That Lee Arenas has selected the Lot No. 46, Sec. 14, Tract No. 39, Sec. 26, and E ½ SW ¼ NW ¼ & SE ¼ NW ¼ NW ¼ & SW ¼ NE ¼ NW¼ of Sec. 26, all in Township 4 South, Range No. 4 East of the San Ber. M., containing 47 acres, more or less, according to Government Survey. Stake No. ———

"Not valid unless approved by the Secretary of the Interior." [7]

(signed) H. E. WADSWORTH
U. S. Special Alloting Agent."

"6-1060"

VIII.

That long prior to the issuance and delivery of said Certificate of Selection for Allotment, this complainant had been in actual physical possession of a portion of the said lands so selected by him for allotment in severalty as aforesaid, had actually resided thereon, and had erected valuable buildings and improvements thereon, and that from and since the selection of said parcels of land aforesaid by this complainant for allotment in severalty to this complainant and from and since the notification thereof given by complainant, as aforesaid, to said H. E. Wadsworth, as said Special Alloting Agent at Large, and the issuance and deliv-

ery of the aforesaid Certificate of Selection for Allotment in Severalty, as aforesaid, complainant has at all times had and possessed the exclusive and preemptive right to the exclusive use and benefit of the said lands so selected by this complainant for allotment in severalty, and had a vested interest therein.

IX.

That on or about the 26th day of October, 1923, said H. E. Wadsworth as such Special Alloting Agent at Large, inquired of the Indian Office at Washington, D. C., whether or not the Mission Indians of the State of California, who had made their selection of lands for allotment were to be permitted to take immediate possession of the lands so selected by them and have the individual and exclusive use thereof for agricultural purposes.

X.

That thereafter, on October 26, 1923, the Indian authorities at Washington, D. C., advised said H. E. Wadsworth, as such agent, that the Mission Indians who had made selection of Reserva- [8] tion lands as aforesaid, might enter upon and take actual, physicial possession of their respective selections of lands for allotment in severalty, and might, without objection of the said Bureau of Indian Affairs of said Department of the Interior, enter upon and enjoy actual, physical possession in severalty of the lands so selected by them for the purpose of the cultivation and planting of early crops.

XI.

That thereafter said H. E. Wadsworth, as such Special Alloting Commissioner at Large, and in accordance with the custom and usual conduct of said Bureau of Indian Affairs, encouraged and permitted said allottees, including complainant, to enter upon and take sole and exclusive physical possession of, and to improve, the lands so selected by them, as aforesaid.

XII.

That by reason thereof, this complainant and others of said selectees, did enter upon, cultivate and substantially improve said lands. That by reason thereof, complainant did expend, work, labor and materials and incurred personal liability thereby in the improvement of his parcels of land.

XIII.

That thereafter said H. E. Wadsworth, as such Special Alloting Agent, issued and delivered to your complainant the Certificate of Selection of said lands as aforesaid. That said lands are the same lands your complainant had previously selected to take as an allottee in severalty under and pursuant to the Acts of Congress aforesaid; that at the time of the issuance of the said Certificate of Selection aforesaid and subsequent thereto, the said H. E. Wadsworth, Special Alloting Agent at Large, as aforesaid, did state and represent to your complainant that the said Certificate of Selection, aforesaid, was and would be evidence of complain-

ant's vested right and authority to possess, hold and improve the said [9] lands hereinabove described, in severalty, until patents in trust for said particular lands were issued to and received by complainant from the defendant.

XIV.

That subsequent to the selection of the lands aforesaid by this complainant, as aforesaid, and subsequent to the scheduling and certification of said vested rights in and to said lands in this complainant, as aforesaid, the defendant, acting by and through its Commissioner of Indian Affairs of the Bureau of Indian Affairs, of the Department of the Interior, and the Secretary of the Interior, represented and stated to complainant that a patent in trust would issue to this complainant covering said particular parcels of land, aforesaid, by reason of said selection, scheduling and certification for allotement, as aforesaid. That this complainant relied thereon and believed said statements and in such belief and reliance complainant made substantial expenditures of work, labor and materials upon said lands, and in the permanent improvement thereof.

XV.

That by reason of the matters herein alleged, this complainant did improve said lands by erecting thereon buildings and other permanent structures and improvements, assigned for and suitable for use for residential, commercial and business pur-

poses, productive of income and revenue, and equipped with conveniences for the use, maintenance and operation thereof and the continuous permanent improvement of said lands. That by reason thereof, said respective parcels of land have become productive and now yield to this complainant an annual net income and revenue in excess of $1,000.00 per year, all of which said net income and revenue is attributable to the substantial and permanent improvement of said respective parcels of land by the industry, outlay and effort of your complainant as aforesaid, and said income is a material and [10] substantial portion of the annual income of your complainant.

XVI.

That substantially fifty per cent (50%) of the moneys so used and consumed by complainant in the permanent improvement of said parcels of land aforesaid, were obtained by his complainant from sources entirely independent of said lands, and were the moneys of this complainant derived by this complainant from his own business, foresight, efforts, and economic acumen, ability and foresight, and the remainder of said moneys so expended in said improvement of said parcels of land, were obtained and procured by this complainant as revenue from said parcels of land, and from the permanent improvements made thereon by your complainant. That said improvements upon said lands were and are of a substantial and permanent nature and

that complainant did expend in the making of said substantial and permanent improvements upon said lands an aggregate sum in excess of Fifteen Thousand Dollars ($15,000.00), lawful money of the United States of America, and a great deal of the personal time and labor of this complainant.

XVII.

That this complainant would not have made said permanent improvements and would not have expended said work and labor, or said materials and money in the erection of said improvements upon said respective parcels of land, excepting for said conduct and representation of the said defendant, its agents, servants and employees.

XVIII.

That by reason of said expenditures in the improvement of said lands, and said conduct of the defendant, its official representatives, agents, servants and employees, as aforesaid, the said lands were and have become greatly enhanced in value.

That by reason of the acts and conduct of the defendant, its agents, representatives, agencies, servants and employees, [11] as aforesaid, the defendant is estopped to deny the validity of complainant's right, title and interest in and to said lands, and is further estopped as aforesaid, from denying, questioning or attacking complainant's right, title and interest therein.

XIX.

That the present reasonable market value of the

said lands so selected by this complainant for allotment in severalty to this complainant from the lands of said Band of Mission Indians and the improvement thereof as aforesaid, is in excess of $15,000.00.

XX.

That from and after the selection of said lands by complainant as aforesaid, and from and after the placing of the descriptions of the said lands upon the Special Allotment Schedules of the said H. E. Wadsworth, Special Allotment Agent of the United States of America for the Mission Indian Reservations of California, as aforesaid, and subsequent to the issuance and delivery of the aforesaid Certificate of Selection therefor, and subsequent to the actual entry upon and taking of actual, physical possession of the said lands by this defendant, separate and apart from all other lands of said Agua Caliente, or Palm Springs, Mission Band of Indians and during and through the creation, construction and making of the permanent improvements upon said selected lands as aforesaid by this complainant, the defendant, its Secretary of the Interior and its Commissioner of Indian Affairs of the Bureau of Indian Affairs of the Department of the Interior of the United States of America, did withhold action approving the said Certificate of Selection for the Allotment of said lands for a long, unreasonable and unwarranted period of time, from and after, to wit, the 21st day of June, 1923, to and until a date long subsequent thereto, and the

exact day and date of which is unknown to complainant, has not been disclosed [12] by defendant, and of which day and date complainant has to this time not been informed, and by its Secretary of the Interior did then and there, and very recently, without notice to complainant, and in violation of the vested rights, title and interests of this complainant, disapprove the said Special Schedules of Allotments of Lands in the Agua Caliente, or Palm Springs, Mission Indian Reservation, and did disapprove the Certificate of Selection for Allotment, aforesaid.

XXI.

That the Secretary of the Interior, after having once determined that in his opinion the members of said Band of Mission Indians, and the members thereof, including your complainant, had adopted the habits of civilization and were so far advanced in civilization as to be capable of owning and managing land in severalty, and, after having, caused selection of the lands to be allotted in severalty to be made by such Indians, including your complainant, and the Schedules of Allotment to be made in accord with such selections made by said Indians, including your complainant, and having partially executed the allotments aforesaid, including that to your complainant, and having permitted and encouraged said Indian allottees to enter upon said selected lands and to improve the same as aforesaid, the Secretary of the Interior was and is wholly without discretionary power to change, modify or

alter his decision theretofore made, or to vacate, avoid or set aside the selections for allotements theretofore made by such Indians including your complainant, and that said action of disapproval of said selections for allotement, said schedules of allotement and said certificates of selection for allotment, including those of your complainant, by said Secretary of the Interior were and are void and of no effect whatsoever.

XXII.

That such disapproval by the Secretary of the Interior of [13] such selections, schedules and Certificates of Allotment, and more especially that of complainant, is arbitrary, biased, prejudiced and wholly without authorization or justification under the terms and provisions of the Acts of Congress, aforesaid, and is and does amount to the perpetration of a fraud by the Secretary of the Interior upon such Indian selectees for allotment of lands in severalty of said Indian Reservation, and more especially upon complainant.

XXIII.

That this complainant is suffering and will continue to suffer, great and irreparable injury and damage by said action of the Secretary of the Department of the Interior of the United States.

XXIV.

That Francisco Arenas, the complainant's father, was a full blood Indian of the Agua Caliente or

Palm Springs Band of Mission Indians of California; that at all times herein mentioned said Francisco Arenas was of age and a duly enrolled and recognized member of said Band; and that said Francisco Arenas was at the date of his death which occurred on the 4th day of October, 1924, and had been during all of his life, a resident upon the Reservation of said Band of Indians; that throughout his entire life Francisco Arenas had voluntarily adopted the habits and ways of civilization, lived separate and apart from all other members of said Band, although at all times remaining an enrolled member of said Band and maintaining his tribal relationships therewith, without in any manner abandoning or waiving his vested rights, titles and interests in tribal funds, lands, property or revenues or any rights, privileges or immunities, vested in him as a member of said Agua Caliente, or Palm Springs, Band of Mission Indians of California.

[14]

XXV.

That said H. E. Wadsworth as such Special United States Alloting Agent at Large for the Mission Indian Reservations of California, and acting in accordance with and pursuant to the authority in him as aforesaid, and acting under the authority and direction of the Secretary of the Interior of the United States and the Statutes of the United States of America therefor provided, did allot to said Francisco Arenas, on the 21st day of

June, 1923, the following described lands, to wit:
Parcel (a) Homesite:

Lot No. 28, Section 14, Twp. 4 South, Range 4 East, S.B.B. & M., comprising two (2) acres;

Parcel (b) Irrigated:

Tract No. 42, Sec. 26, Twp. 4 S., Range 4 East, S.B.B. & M., comprising five (5) acres;

Parcel (c) Desert:

SW¼ SW¼ Sec. 26, Twp. 4 S., Range 4 East, S.B.B. & M., comprising forty (40) acres;

totaling forty-seven (47) acres, and contained in the said Allotting Agent's schedule of June 21, 1923, said land being a part of the Agua Caliente, Palm Springs, Mission Indian Reservation, in Riverside County, California; that under and by virtue of the said allotment the said Special Alloting Agent issued a Certificate to said Francisco Arenas under which he, the said Francisco Arenas, became entitled to the sole use and benefit of said allotment, and the lands described thereunder, which are the same lands said Francisco Arenas had previously selected to take.

XXVI.

That subsequent to the making of said allotment to said Francisco Arenas as aforesaid, said defendant represented to said Francisco Arenas that from and after the making of said allotments as aforesaid, said Francisco Arenas was entitled to enter upon and [15] take possession of the lands covered by said allotment, and to improve the same,

and that said Certificate of Allotment would be evidence of said Francisco Arenas' authority to so possess, use and improve said lands until Trust Patents upon said lands should be issued to said Francisco Arenas by said Secretary of the Interior.

XXVII.

That subsequent to the making of said Allotment as aforesaid, said defendant represented to said Francisco Arenas that a Trust Patent would issue to said Francisco Arenas upon said lands by reason of said allotment, and that said Francisco Arenas was fully justified in making substantial expenditures of time, money and property upon the lands covered by said allotment, and encouraged said Francisco Arenas to enter upon and improve said lands.

XXVIII.

That said Francisco Arenas believed said representations, and each of them, and relied thereupon, and by reason thereof and not otherwise, and subsequent to the making of said representations, as aforesaid, said Francisco Arenas improved said lands described in said allotment by erecting thereon buildings and other structures designed for use and suitable for use for residential and business purposes and conveniences, and expended in the making of said improvements a sum in excess of $750.00, lawful money of the United States of America, and a very great deal of the personal time of said Francisco Arenas. That said Francisco

Arenas would not have made said improvements and would not have expended said time or said money excepting for said conduct and representations of said defendant and its agents and representatives.

XXIX.

That by reason of the expenditure of money and time by said Francisco Arenas in the improvement of said lands covered by said allotment, as aforesaid, the value of said land has been [16] greatly increased, and the said property has been made productive, and yields an annual net income in excess of $150.00 per year, all of which said income is attributable to the improvement of said property as aforesaid.

XXX.

That substantially fifty per cent (50%) of the moneys so used by said Francisco Arenas in the improvement of said lands as aforesaid were obtained by said Francisco Arenas from sources entirely independent of said lands, and were the moneys of said Francisco Arenas, and that the remainder of the moneys expended in the improvement of said lands, as aforesaid, were obtained as revenue from improvements made by said Francisco Arenas upon said lands, in reliance upon the conduct and statement of said defendant and its agents and representatives as herein alleged.

XXXI.

That at all times herein mentioned, while said

improvements were being made by said Francisco Arenas, as aforesaid, said defendant and its Secretary of the Interior, and its Commissioner of Indian Affairs at Washington, knew of the representations so made to said Francisco Arenas by said defendant, and on its behalf as aforesaid, and knew of the improvement of said lands by said Francisco Arenas, as aforesaid, and fully acquiesced therein and encouraged the same.

XXXII.

That the reasonable market value of the said lands under said allotment as improved as aforesaid is about $50,000.00, and said lands yield an annual net income of about $150.00.

XXXIII.

That upon the death of said Francisco Arenas, which occurred on the 4th day of October, 1924, at and upon said Reservation, in the State of California, this complainant succeeded by inheritance to all of the right, title, interest, equity and [17] estate of the said Francisco Arenas, his father, in, to and under said selections for allotment and said allotments, and in, to and under the lands covered thereby, and at all times since this complainant has been and now is the owner and in possession thereof, under an equitable title capable and susceptible of maturing into and becoming a complete legal title in fee simple, and entitled to receive all of the benefits accruing or to accrue therefrom; that ever since the death of said Fran-

cisco Arenas your complainant has been and now is in possession and control of said lands.

XXXIV.

That Guadaloupe Arenas, the complainant's wife, was a full blood Indian of the Agua Caliente, or Palm Springs, Band of Mission Indians of California; that at all times herein mentioned said Guadaloupe Arenas was of age and a duly enrolled and recognized member of said Band; and that said Guadaloupe Arenas was at the date of her death, which occurred on the 26th day of March, 1937, and had been during all of her life, a resident upon the reservation of said Band of Indians, and had voluntarily adopted the ways and habits of civilized life, and lived separate and apart from other members of said Band, although at all times retaining and maintaining her tribal relation therewith and in no wise abandoning or waiving her right to share in *trial* property or any rights, privileges or immunities as a member of said band, and was at all times capable of owning, holding and managing land in severalty.

XXXV.

That said H. E. Wadsworth, as such Special United States Alloting Agent, did allot to said Guadaloupe Arenas, on the 25th day of June, 1923, the following described lands, to wit:

Parcel (a) Homesite:

Lot 47, Sec. 14, Twp. 4 South, Range 4 East,

S.B.B. & M., comprising two (2) acres; [18] Parcel (b) Irrigated:

Tract No. 40, Sec. 26, Twp. 4 South, Range 4 East, S.B.B. & M., comprising five (5) acres; Parcel (c) Desert:

SE¼ NW¼ Sec. 26, Twp. 4 S., Range 4 East, S.B.B. & M., comprising forty (40) acres; totaling forty-seven (47) acres in the County of Riverside, State of California, and contained in the said Alloting Agent's Schedule of June 25, 1923, said land being a part of said Mission Indian Reservation in Riverside County, California, and that under and by virtue of the said allotment the said Special Alloting Agent issued a Certificate of Selection for Allotment to said Guadaloupe Arenas under which she, the said Guadaloupe Arenas, become entitled to the sole use and benefit of said lands covered by said Certificate of Selection for allotment, and the lands described thereunder, which are the same lands the said Guadaloupe Arenas had previously selected to take.

XXXVI.

That said Guadaloupe Arenas at all of the times herein mentioned was, prior to her death as aforesaid, an actual resident upon the said Tract No. 40 hereinabove described and allotted to said Guadaloupe Arenas, and had voluntarily adopted the habits and ways of civilized life, and lived separate and apart from all other members of said Band, although maintaining her tribal relations with said Band, and in no wise ceasing to be an enrolled member thereof.

XXXVII.

That subsequent to the making of said allotment to said Guadaloupe Arenas, as aforesaid, said defendant represented to said Guadaloupe Arenas that from and after the making of said allotment as aforesaid said Guadaloupe Arenas was entitled to enter upon and take possession of the lands covered by said allotment, and to [19] improve the same, and that said Certificate of Allotment would be evidence of said Guadaloupe Arenas' authority to so possess, use and improve said lands until trust patents upon said lands should be issued to said Guadaloupe Arena by said Secretary of the Interior.

XXXVIII.

That subsequent to the making of said Allotment as aforesaid, said defendant represented to said Guadaloupe Arenas that a Trust Patent would issue to said Guadaloupe Arenas upon said lands by reason of said allotment, and that said Guadaloupe Arenas was fully justified in making and encouraged her to make, substantial expenditures of time, money and property upon the lands, covered by said allotment.

XXXIX.

That said Guadaloupe Arenas believed said representations, and each of them, and relied thereupon, and by reason thereof and not otherwise, and subsequent to the making of said representations, as aforesaid, said Guadaloupe Arenas substantially improved said lands described in said allot-

ment by erecting thereon building and other structures designed for use and suitable for use for residential and business purposes and conveniences and expended in the making of said improvements a sum in excess of $12,500.00, lawful moneys of the United States of America, and a very great deal of the personal time of said Guadaloupe Arenas; that said Guadaloupe Arenas would not have made said improvements, and would not have expended said time or said money excepting for said conduct and representations of said defendant.

XL.

That by reason of the expenditure of money and time by said Guadaloupe Arenas in the improvement of said lands covered by said allotment, as aforesaid, the value of said land has been greatly increased and the said property has been made productive [20] and yields an annual net income in excess of $2,500.00, all of which said income is attributable to the improvements of said property as aforesaid.

XLI.

That substantially fifty per cent (50%) of the moneys so used by said Guadaloupe Arenas in the improvements of said lands as aforesaid were obtained by said Guadaloupe Arenas from sources entirely independent of said lands, and were the moneys of said Guadaloupe Arenas, and that the remainder of the moneys expended in the improvement of said lands, as aforesaid, was obtained as

revenue from improvements made by said Guadaloupe Arenas upon said lands, in reliance upon the conduct and statement of said defendant and its agents and representatives as herein alleged.

XLII.

That at all times herein mentioned, while said improvements were being made by said Guadaloupe Arenas, as aforesaid, said defendant knew of the making of said representations, and knew of the improvement of said lands by said Guadaloupe Arenas, as aforesaid, and fully acquiesced therein and encouraged the same.

XLIII.

That the reasonable market value of the said lands under said allotment as improved as aforesaid is about $75,000.00, and said lands yield an annual net income of about $2,500.00.

XLIV.

That upon the death of said Guadaloupe Arenas, which occurred on the 26th day of March, 1937, at and upon said Reservation, in the State of California, this complainant, husband of the said Guadaloupe Arenas, succeeded by inheritance to all of the right, title, interest, equity and estate of the said Guadaloupe Arenas, in, to and under said selection for allotments and said allotments, and in, to the lands covered thereby, and at all times since this complainant has been and now is the owner and in possession thereof, [21] and entitled to re-

ceive all of the benefits accruing or to accrue therefrom; that ever since the death of said Guadaloupe Arenas your complainant has been and now is in possession and control of said lands.

XLV.

That Simon Arenas, the complainant's brother, was a full blood Indian of the Agua Caliente, or Palm Springs, Band of Mission Indians of California; that at all times herein mentioned said Simon Arenas was of age and a duly enrolled and recognized member of said Band; and that said Simon Arenas was at the date of his death, which occurred on the 18th day of February, 1925, and had been during all of his life, a resident upon the Reservation of said Band of Indians; that said Simon Arenas had voluntarily adopted the habits and ways of civilization, lived separate and apart from all other members of said Band, had always maintained his tribal relations with said Band and never waived or abandoned any of his right to share in the property and income thereof, or any rights, privileges, or immunities as a member of said Band.

XLVI.

That Simon Arenas notified said H. E. Wadsworth, as such Special United States Alloting Agent, of his selections of lands of said Reservation for allotment, and said Agent did thereupon allot to said Simon Arenas, on the 21st day of June, 1923, the following described lands, to wit: Parcel (a) Homesite:

Lot No. 43, Sec. 14, Twp. 4 South, Range 4 East, S.B.B. & M., comprising two (2) acres;

Parcel (b) Irrigated:

Tract No. 37, Sec. 2, Twp. 5 South, Range 4 East, S. B. B. & M., comprising five (5) acres;

Parcel (c) Desert:

SE¼ SW¼ Sec. 26, Twp. 4 South, Range 4 East, S.B.B. & M., [22] comprising forty (40) acres;

totaling forty-seven (47) acres, and contained in the said Alloting Agent's Schedule of June 21st, 1923, said land being a part of the Agua Caliente or Palm Springs Mission Indian Reservation in Riverside County, California. That by virtue of the said allotment, said Special Alloting Agent issued a Certificate of Selection for Allotment to said Simon Arenas as to said lands.

XLVII.

That subsequent to the making of said allotment to said Simon Arenas, said defendant represented to said Simon Arenas that from and after the making of said selection for allotment in severalty and said allotment as aforesaid, said Simon Arenas was entitled to enter upon and take exclusive possession of the lands covered by said allotment, and to improve the same, and that said Certificate of Allotment would be evidence of said Simon Arenas' authority to so possess, use and improve said lands until Trust Patents upon said lands should be is-

sued to said Simon Arenas by said Secretary of the Interior.

XLVIII.

That subsequent to the making of said selection for allotment by said Simon Arenas and that subsequent to the making of said allotment to said Simon Arenas thereof, as aforesaid, said defendant represented to said Simon Arenas that a Trust Patent would issue to said Simon Arenas upon said lands by reason of said allotment, and that said Simon Arenas was fully justified in making substantial expenditures of time, money and property upon the lands covered by said allotment.

XLIX.

That said Simon Arenas believed said representations, and each of them, and relied thereupon, and by reason thereof and not otherwise, and subsequent to the making of said representations as aforesaid, said Simon Arenas improved said lands described in said allotment by erecting thereon buildings and other structures [23] designed for use and suitable for use for residential and business purposes and conveniences, and expended in the making of said improvements a sum in excess of $500.00, lawful money of the United States of America, and a very great deal of the personal time of said Simon Arenas; that said Simon Arenas would not have made said improvements and would not have expended said time or said money excepting for the said conduct and representations of said defendant.

L.

That by reason of the expenditure of money and time by said Simon Arenas in the improvement of said lands covered by said allotment, as aforesaid, the value of said land has been greatly increased, and has become very valuable by reason of its close proximity to Palm Springs, a Municipal Corporation of great wealth.

LI.

That substantially fifty per cent (50%) of the moneys so used by said Simon Arenas in the improvement of said lands as aforesaid were obtained by said Simon Arenas from sources entirely independent of said lands, and were the moneys of said Simon Arenas, and the remainder of the moneys expended in the improvement of said lands, as aforesaid, were obtained as revenue from improvements made by said Simon Arenas upon said lands, in reliance upon the conduct and statement of said defendant and its agents and representatives as herein alleged.

LII.

That at all times herein mentioned, while said improvements were being made by said Simon Arenas, as aforesaid, said defendant knew of the representations so made to said Simon Arenas, and knew of the improvement of said lands by said Simon Arenas, as aforesaid, and fully acquiesced therein and encouraged the same.

LIII.

That the reasonable market value of the said lands under [24] said allotment as improved as aforesaid is about $50,000.00.

LIV.

That upon the death of said Simon Arenas, brother of complainant, which occurred on the 18th day of February, 1925, at and upon said Reservation, in the State of California, this complainant succeeded by inheritance to all of the right, title, interest, equity, and estate of the said Simon Arenas in, to and under said allotments, and in, to and under the lands covered thereby, and at all times since this complainant has been and now is the owner and in possession thereof, and entitled to receive all of the benefits accruing or to accrue therefrom; that ever since the death of said Simon Arenas your complainant has been and now is in possession and control of said lands.

LV.

That by reason of the matters herein set forth, said defendant is estopped to withhold from this complainant a Trust Patent to be issued by said Secretary of the Interior to this complainant, upon the lands covered by said allotment, and is estopped to deny the right of this complainant to a Trust Patent upon said lands pursuant to and under said allotment.

LVI.

That the authority for bringing this suit and nam-

ing the United States of America as a party defendant rests under the Acts of Congress of August 15, 1894 (28 Stat. L. 305) and as amended by Act of February 6, 1901 (31 Stat. L. 760).

LVII.

That your complainant has many times made requests upon the proper agents of the United States to secure unto him an allotment Trust Patent for the lands herein described, and which have been allotted to him as herein alleged, and to which he has succeeded by inheritance as aforesaid, but that said Allotment Trust Patents have not, up to this date, been issued to him by the United States [25] of America, and said defendant refuses to issue the same.

LVIII.

That for a long period of time, to wit, from June 21, 1923, to and until the present time of the filing of this Second Amended Bill of Complaint, the Bureau of Indian Affairs of the Department of the Interior of the United States of America, by and through its officers, agents, and servants, and the Commissioner of Indian Affairs of the Bureau of Indian Affairs of the Department of the Interior, and the Secretary of the Interior of the United States under color of their respective official positions, have, pursuant to a prearranged and preconcerted plan and course of action, as your complainant is informed and believes, and therefore alleges, have committed, and are committing, arbitrary, il-

legal and detrimental acts conflicting with, and in violation of, provisions of the Acts of Congress aforesaid, thereby discriminating against the individual members of the aforesaid Agua Caliente, or Palm Springs, Band of Mission Indians, and tending to set at naught the provisions of the Acts of Congress then and there in full force and effect, and discriminating against this complainant, in connection with the matters herein alleged, and do seek to deprive said respective Indians, including complainant, of the right to acquire legal title to said property in severalty, and do seek to retard their economic and social development, and deprive them of their lands of said reservation and respective allotments of land in severalty, and do seek to procure their removal therefrom, including complainant, and to cause the same, and to procure the leasing for development for recreational and resort purposes of lands, within the territorial limits and aboundaries of the aforesaid Agua Caliente, or Palm Springs, Mission Indian Reservation, including the aforesaid allotments of complainant, and did and so wrongfully withhold, pursuant to said plan and purpose to despoil said Indians, the issuance of patents in trust to said Reservation Indians, in-
[26] cluding complainant, for the lands selected for allotment and actually possessed and occupied in severalty by the said members of said band of Mission Indians aforesaid, and to seek to divest and deprive the said Indian selectees and allottees of their said property rights, and do connive and col-

lude with private interests and persons, firms and corporations of great wealth and political power to illegally and unlawfully prevent and retard the economic and social development of the individual members of the said Agua Caliente, or Palm Springs, Band of Mission Indians, who had selected specific parcels of land for allotment, in severalty, in conformity with the then existing allotment laws of the United States, and the then existing Acts of Congress, aforesaid, and to deprive them of their interests therein, without any compensation therefor.

LIX.

That complainant has been especially aggrieved and damaged and defrauded by the conduct of said Bureau of Indian Affairs, its officers, agents, servants and employees, and the said Commissioner of Indian Affairs and his servants, agents and subordinate employees of the United States functioning under him, and of the said Secretary of the Department of the Interior.

LX.

That the complainant is informed and believes and therefore alleges, that the said officials, representatives, agents, servants and employees of the defendant were then and there, and have been for a long time, acting pursuant to a prearranged and preconcerted plan and course of action, in collusion with the Palm Springs Chamber of Commerce and other wealthy and powerful local interests of The City of Palm Springs, and many powerful and in-

fluential residents and citizens of the city of Palm Springs in seeking to deprive, and are now seeking to deprive, said enrolled members of the said Agua Caliente, or Palm Springs, Band of Mission Indians, including complainant, of the exclusive right of use and [27] occupancy of said Palm Springs, or Agua Caliente, Indian Mission lands, and seeking to prevent the completion of the allotment of any portions thereof to qualified Agua Caliente, or Palm Springs, Mission Indian Selectees for Allotment, and to prevent the maturing and completion of the vested equitable rights, titles and interests of members of said Band, including complainant, from maturing into and becoming full and complete legal titles in and to any portion of the aforesaid Agua Caliente, or Palm Springs, Mission Indian Reservation, because and by reason of the great value of said lands, so selected for allotment by individual members of said Band, as aforesaid, and to keep and prevent said allotted lands, or any portion thereof, from passing into the private ownership and hands of Agua Caliente, or Palm Springs, Mission Indians, including complainant.

LXI.

That the complainant is informed and believes and therefore alleges, that pursuant to said wrongful plan and purpose, there is now, and for a long time has been, a well organized effort and campaign, as aforesaid, to cause the removal of the aforesaid enrolled selectees for allotment in severalty of par-

cels of land in said Agua Caliente, or Palm Springs, Mission Indian Reservation, including complainant, from the respective parcels of land heretofore informally assigned by said Band to certain of its individual enrolled members, and heretofore occupied and improved by them, including complainant, and thereafter lawfully selected by them, including complainant, for allotment in severalty, and to procure the sale in bulk of the aforesaid allotted lands of the said Agua Caliente, or Palm Springs, Mission Indian Reservation, or in default thereof, to obtain and procure the leasing of a large part of said Agua Caliente, or Palm Springs, Mission Indian Reservation lands to private interests for development for resort and recreational purposes by interested white persons of Palm Springs [28] and the vicinity, and in the interest of persons, firms and corporations of great wealth, power and influence, or in the alternative, to obtain and procure the erection and creation by an Act of Congress of a "National Monument" carved out of and embodying a large part of the lands of the said Agua Caliente or Palm Springs, Band of Mission Indians, so as to prevent the development, use, and occupation of said lands by said Agua Caliente, or Palm Springs, Band of Mission Indians, including complainant, all to the great, injury, damage and irreparable detriment of the said Agua Caliente, or Palm Springs, Band of Mission Indians, the enrolled members thereof, and more especially the selectees including this complainant, of lands for allotment in severalty under

the existing Acts of Congress, aforesaid, and the allottees having, holding and occupying parcels of land in severalty in said Reservation, under and pursuant to informal assignment thereof by said Agua Caliente, or Palm Springs, Band of Mission Indians and said executed and delivered Certificates of Selection for allotment in severalty, aforesaid, including this complainant.

LXII.

That this complainant is informed and believes, and therefore alleges, upon information and belief, that the sole and only reason for the withholding and neglect of the said Secretary of the Department of the Interior of the United States of approval of the said Certificates of Selection for allotment and of the Patents in Trust by the defendant in favor of each of the said selectees for allotment in severalty of lands of the Agua Caliente, or Palm Springs, Band of Mission Indians, including this complainant, was by the acts, and actions, of the said Bureau of Indian Affairs of the Department of the Interior of the United States, and of the Commissioner of the Bureau of Indian Affairs and the Secretary of the Interior of the United States and was and is the presently existing great value of the real property so selected by the respective [29] members of the Agua Caliente, or Palm Springs, Band of Mission Indians, including this complainant. The said selections for lands to be allotted, in severalty, and patented in trust to the respective members of said Agua Caliente, or Palm

Springs, Band of Mission Indians, including those lands selected for allotment by complainant are now, and for a long time have been, of great value by reason of the close proximity of the City of Palm Springs, a winter resort frequented and patronized by people of great wealth and social position, to said lands and allotments the gradual development of a small desert town of no particular consequence or importance into a City of the Sixth Class, recently incorporated, and in which there have been erected, upon lands privately owned by white people, buildings and improvements of great value, including two hotels, each valued in excess of $1,000,000, erected in close proximity to the Agua Caliente, or Palm Springs, Indian Reservation; the greatly enhanced and increased commercial value of the real estate in said fashionable winter resort, the close proximity to an Indian Spring, which is within the confines and limits of the aforesaid Agua Caliente, or Palm Springs, Indian Reservation; the fact that the said Agua Caliente, or Palm Springs, Indian Reservation consists of checker-boarded even numbered sections of land spread between and surrounded by adjacent odd numbered sections of land, which have been thickly settled and populated by white people, deriving their titles to such lands from and through grants by the Southern Pacific Railway Company, which receive every odd numbered section of land in the vicinity of the said Agua Caliente, or Palm Springs, Mission Indian Reservation, aforesaid, by land grant from the

United States, and thereafter disposed of the same for settlement and subdivision by white people; the great and rapid growth and augmentation of the population of said odd sections of land so granted to the Southern Pacific Railroad Company, as aforesaid, resulting from sub-division of said lands so granted by the [30] Southern Pacific Railroad Company, to whites, in small parcels held in fee simple individual ownership by many wealthy and influential white people; the exemption from taxation granted by the Acts of Congress and Executive Order of the President of the United States, aforesaid, to said Reservation Indians, including complainant, and the desire, of many of said nearby white people, aided, abetted and assisted by the Palm Springs Chamber of Commerce and defendant, to acquire, own and possess the lands now comprised within the boundaries and limitations of the said Agua Caliente, or Palm Springs, Indian Reservation, aforesaid.

LXIII.

That the said plan by and on the part of white people owning real property in the vicinity of the aforesaid Agua Caliente, or Palm Springs, Mission Indian Reservation, has had and now has the active participation and co-operation of the Mission Indian Agency of the Bureau of Indian Affairs, of the Department of the Interior and the agents, servants and employees thereof and the said Bureau of Indian Affairs and Secretary of the In-

terior, and in aid thereof the issuance of said patents has been withheld.

LXIV.

That after so finding as a fact, that the aforesaid members of the Agua Caliente, or Palm Springs, Band of Mission Indians, including this complainant, had adopted the habits and ways of civilized life and attained a degree of civilization justifying the allotment in severalty of lands of the said reservation to individual allottees, including this complainant, the act of the Secretary of the Interior in holding the approval of the Special Schedules of Allotment of H. E. Wadsworth, Special Alloting Agent at Large of the Mission Indian Bands of California in abeyance for a long period of time, as aforesaid, and then, after the rejection and disapproval of a bill presented to the House of Representatives of the United States (H.R. 5297, 75th Congress, 1st Session) by [31] the Secretary of the Interior for the purpose of repealing that provision of the Act of March 2, 1917 (39 Stat. L., 976) directing the making of allotments to Indians of the Agua Caliente, or Palm Springs, Band of Mission Indians of the Agua Caliente, or Palm Springs, Band of Mission Indians Reservation, by the Secretary of the Interior, and after the rejection and disapproval of the same bill No. S. 1424, and the rejection and disapproval of Senate Bill "S. 2589", the action of the Secretary of the Interior in disapproving the Certificates of Selection of lands for allotment to this complainant in severalty, as afore-

said, was and is an arbitrary, oppressive and coercive act, done in violation of the then and there existing vested rights of this complainant in and to all of the aforesaid described parcels of land, and in violation of the terms and provisions of the Act of Congress of Mareh 2, 1917 (39 Stat. L. 976), and was and is an overt act committed pursuant to said prearranged and preconcerted plan and course of action, aforesaid.

LXIX.

That the failure to complete the partially executed allotments of parcels of selected lands, as aforesaid, to the individual enrolled allottees of the said Agua Caliente, or Palm Springs, Band of Mission Indians, under and pursuant to the aforesaid Acts of Congress, and in derogation of the vested rights of the said allottees, has resulted, and is resulting, in the retardation of the economic and social welfare of the said Agua Caliente, or Palm Springs, Band of Mission Indians and the enrolled members of the said Band, including your complainant.

LXX.

That the actions of the aforesaid Bureau of Indian [32] Affairs of the Department of the Interior of the United States, and the actions of the Secretary of the Interior of the United States, are and have been, throughout a long period of time, pursuant to a prearranged and preconcerted plan and course of action to destroy the interests of said Indians in said lands.

LXXI.

That during and throughout the time during which the said Secretary of the Interior and his predecessors in office were holding in abeyance, without action, either approval or disapproval, of the said Official Schedules of Allotment of H. E. Wadsworth, Special Allotting Agent at Large for the Mission Indian Reservations of California covering the allotments selected by the enrolled members of the Agua Caliente, or Palm Springs, Band of Mission Indians, including complainant, and during the time throughout which the said Secretary of the Interior and his predecessors in office were withholding action of approval or disapproval of the Certificates of Selection issued to the individual enrolled members of the said Agua Caliente, or Palm Springs, Band of Mission Indians, issued by the said H. E. Wadsworth, Special Alloting Agent, aforesaid, the Department of the Interior, its official representatives, agents, servants and employees, were engaged in conducting, in breach of their fiduciary duty to this complainant, as an incompetent ward of the United States, a campaign in collusion with and co-operating with certain private interests of great wealth and power, and more particularly the Chamber of Commerce of the City of Palm Springs and numerous members thereof, to procure the enactment of Acts of Congress detrimental to the interests of this complainant and destructive of, or seeking to destroy, the vested right, title and interest of this complainant

in and to the aforesaid lands, all pursuant to a prearranged and preconcerted plan and course of action, and to the injury and detriment of complainant. [33]

LXXII.

That your complainant is without adequate remedy at law in the premises.

Wherefore, complainant prays:

That it be adjudged, ordered and decreed by this Court:

1. (a) That on, to wit, the 21st day of June, 1923, and on to wit, the 9th day of May, 1927, this complainant and Francisco Arenas, his father, Guadaloupe Arenas, his wife, and Simon Arenas, his brother, had each voluntarily adopted the habits and ways of civilized life by voluntarily living separate and apart from all other Indians of the Agua Caliente, or Palm Springs, Band of Mission Indians, and from all other tribal Indians, although still maintaining tribal relations with said Agua Caliente, or Palm Springs, Band of Mission Indians, without in anywise waiving or terminating their respective rights, in and to the tribal lands and the uses and benefits thereof of the said Agua Caliente, or Palm Springs, Band of Mission Indians lands and property; that said status was and has been maintained by complainant to and until the present date and that said status was maintained by the said Francisco Arenas, Guadaloupe

Arenas and Simon Arenas to and until their respective deaths, and that complainant now has and the aforesaid Francisco Arenas, Guadaloupe Arenas, and Simon Arenas to and until their respective deaths, and that complainant now has and the aforesaid Francisco Arenas, Guadaloupe Arenas, and Simon Arenas did have and possess until the time of their respective deaths, the degree of civilization necessary to possess the capacity to own, hold and manage lands in severalty, at all times;

(b) That the selection and notification of the selection of specific parcels of land within the confines and limits of the Agua Caliente, or Palm Springs, Mission Indian Reservation to H. E. Wadsworth, Special Allotting Agent at Large of the United States for the Mission Indian Reservations prior to the preparation and [34] execution of the Official Schedules of Allotment of the lands of the Agua Caliente, or Palm Springs, Band of Mission Indians of California, on to wit, June 21st, 1923 and May 9, 1927, respectively did vest in complainant and in the complainant and in the said Guadaloupe Arenas, Francisco Arenas and Simon Arenas rights, titles and interest in and to the lands so selected by them, and each of them, separate and apart from all other members of said Band;

(c) That the acts and conduct of the Secretary of the Interior of the United States and his predecessors in office as Secretary of the Interior of the United States, in withholding approval or disapproval of the aforesaid Official Schedules of Allot-

ment prepared by H. E. Wadsworth, Special Allotting Agent at Large of the United States for the Mission Indian Reservations of California, dated, to wit, June 21st, 1923 and May 9th, 1927 and in holding the matter of the approval or disapproval of the Secretary of the Interior thereof in abeyance for a long period of time, were and are acts of negligence of official mandatory and ministerial duty amounting to fraud perpetrated against this complainant and against Francisco Arenas, Guadaloupe Arenas, and Simon Arenas, respectively;

(d) That the acts and conduct of the Secretary of the Interior of the defendant and his predecessors in office as Secretary of the Interior of the United States in withholding the approval or disapproval of the Certificates of Selection for Allotment of this complainant and of Francisco Arenas, Guadaloupe Arenas and Simon Arenas issued to this complainant and to said Francisco Arenas, Guadaloupe Arenas and Simon Arenas, respectively, by the said H. E. Wadsworth, Special Allotting Agent at Large of the United States for the Mission Indian Reservations of California and the Commissioner of Indian Affairs for a long period of time, and the action of the Secretary of the Interior in thereafter [35] disapproving the said respective Certificates of Selection of Lands for allotment in severalty, aforesaid, were and are acts of neglect of official, mandatory and ministerial duty amounting to fraud, and that complainant and said Francisco Arenas, Guadaloupe Arenas and Simon

Arenas did each acquire vested interests in and to the lands described in such Certificates and that this complainant now possesses vested interests in and to the lands described in such respective certificates;

(e) That the subsequent disapproval of said Certificates of Selection of Lands of the Agua Caliente, or Palm Springs, Band of Mission Indians to this complainant and to Francisco Arenas, Guadaloupe Arenas and Simon Arenas by the Secretary of the Interior of the United States, after the rights, titles and interests of each of said persons had vested in the lands therein described was and is null, void and of no effect whatever and operated to divest each of the said persons of a vested right, title and interest in and to real property, without due process of law, in violation of the Fifth Amendment of the United States of America;

(f) That complainant is entitled to a Trust Patent, or Trust Patents, to all of the said lands hereinabove described from the United States of America.

(2) That a copy of the Judgment and Decree of this Court be certified to the Secretary of the Interior of the United States;

(3) That all costs and disbursements of this Complainant, in and about this action incurred be paid by the defendant from funds other than the tribal funds of the said Agua Caliente, or Palm Springs, Band of Mission Indians of California and;

(4) That the complainant have such other and further relief as justice and equity may require.

DAVID D. SALLEE
OLIVER O. CLARK
HARRY ASHTON
Attorneys for Complainant. [36]

(Duly verified.)

[Endorsed]: Filed Oct. 27, 1941. [37]

[Title of District Court and Cause.]

NOTICE OF MOTION FOR DISMISSAL OF SECOND AMENDED COMPLAINT, OR IN THE ALTERNATIVE, FOR A SUMMARY JUDGMENT

To David D. Sallee, Oliver O. Clark, and Harry Ashton, Attorneys for Plaintiff in the above entitled cause:

You and Each of You Will Please Take Notice that the defendant, United States of America will, on the 12th day of January, 1942, at the hour of ten o'clock A.M., or as soon thereafter as counsel may be heard, bring on for hearing before the above entitled court, in the courtroom of the Honorable J. F. T. O'Connor, in the United States Post Office and Court House Building, Los Angeles, California, a motion to dismiss the second amended complaint heretofore filed herein on October 27, 1941, on the grounds that it does not contain a short and plain

statement of the claim of plaintiff herein as required by Rule 8(a), New Federal Rules of Civil Procedure, and on the further ground that said second amended complaint is prolix, voluminous, argumentative, and abounds in impertinent, scandalous, redundant and immaterial matter.

You and each of you will further take notice that said defendant, at the same time and place, in the event the above mentioned motion to dismiss said second amended complaint is denied, will bring on for hearing a motion that summary judgment be entered against the plaintiff herein on the grounds that there is no genuine issue as to any material fact, and that the defendant is entitled to judgment as a matter of law in accordance with Rule 56(b) and (c) of the Federal Rules of Civil Procedure. [38]

Said alternative motions will be based upon the files, records and pleadings of the above entitled action, the files, records, pleadings and further proceedings in the case of St. Marie vs. United States, filed in this District and numbered Equity 918-Y, upon the following documents, copies of which are attached hereto, the originals of which are heretofore filed herein on March 11, 1941:

(a) Affidavit of Carl Spinner;

(b) Certificate of E. J. Armstrong;

(c) Points and authorities,

and upon the memorandum of points and authorities and the affidavit of Frederick H. Steinmetz, attached hereto and filed this date.

Dated: November 29, 1941.

WM. FLEET PALMER,
United States Attorney.
IRL D. BRETT,
FREDERICK H. STEINMETZ,
Special Attorneys,
Lands Division,
Department of Justice
By FREDERICK H. STEINMETZ
Attorneys for Defendant. [39]

[Title of District Court and Cause.]

AFFIDAVIT OF CARL SPINNER

Carl Spinner, being first duly sworn, deposes and says:

(1) That he is the Principal Clerk of the Mission Indian Agency of the Office of Indian Affairs of the Department of the Interior, located at Riverside, California; that he was first appointed to service on January 19, 1922, and was assigned to duty in the above agency at Riverside, California; that he has served in one capacity or another in the Mission Indian Agency from 1922 until the present date; that during that time he has been in constant touch with the affairs of the Palm Springs or Agua Caliente Band of Mission Indians of California, being for those years in a clerical capacity where the records and files pertaining to such Indians were maintained and kept;

(2) That he is familiar with the allotment schedule prepared by Special Alloting Agent Harry E. Wadsworth in the year 1923; that he is also familiar with the schedule of allotments prepared by said Special Allotting Agent for the Palm Springs Band of Mission Indians in 1927; that he has examined and is acquainted with the certificates of selection issued to various individual members of the said band by said Special Allotting Agent; that he is familiar with all of the correspondence, files, and reports pertaining to such allotment schedule and the [40] correspondence from the Secretary of the Interior in relation thereto; and that in such correspondence, records, reports, and files there is not and never has been an approval by the Secretary of the Interior of said schedules of allotment or any of them, or of any certificate of selection, but on the contrary such files, etc., reveal that the Secretary of the Interior has disapproved the allotment schedule and certificates of selection.

(signed) CARL SPINNER

Subscribed and sworn to before me this 6th day of May, 1941.

(s) LOWELL W. LYONS
Notary Public in and for said county in said state.

My commission expires Nov. 24, 1943. [41]

CERTIFICATE OF E. J. ARMSTRONG

United States
Department of the Interior
Office of Indian Affairs
Washington

District of Columbia—ss.

This is to certify that the records of this Office show that neither of the allotment schedules prepared by Harry E. Wadsworth, Special Allotting Agent at Large, under date of June 21, 1923, nor May 9, 1927, nor any of the certificates of selection issued by him, covering lands within the Agua Caliente or Palm Springs Indian Reservation, California, which certificate of selection expressly show on the face thereof "not valid unless approved by the Secretary of the Interior", were ever approved by the Secretary of the Interior of the United States as required by the law in order to perfect or validate such selections in allotment.

Witness my hand and seal of this Office this 8th day of March, 1941 A. D.

[Seal] E. J. ARMSTRONG
Acting Commissioner.

Subscribed and sworn to before me this 8th day of March, 1941 A. D., in Washington, D. C.

[Notary's Seal] JEFF D. WARD JR.
Notary Public.

My commission expires: Nov. 15, 1944. [42]

[Title of District Court and Cause.]

AFFIDAVIT OF FREDERICK H. STEINMETZ

United States of America,
Southern District of California—ss:

Frederick H. Steinmetz, being first duly sworn, deposes and says:

1. That he is a Special Attorney, Lands Division, of the United States Department of Justice; that as such he is one of the attorneys for the defendant in the above entitled cause;

2. That this is an action to compel the defendant to issue a trust patent to the plaintiff for certain lands;

3. That your affiant verily believes that there is no genuine issue as to any material fact, and that defendant is entitled to judgment as a matter of law;

4. That the subject matter and purpose of the second amended complaint herein and of the material allegations thereof are the same as the subject matter, purpose and allegations of the complaint in the case of St. Marie vs. U. S. filed in this District and numbered Equity 918-Y, and decided by this court against the plaintiffs therein, who were in the same position as plaintiff herein, and in favor of the defendant, United States of America, being the same defendant as in this case;

5. That the decision of this court in St. Marie vs. United States is reported in 24 Fed. Supp. 237; that the judgment of this court [46] in said case was affirmed by the Circuit Court of Appeals for the 9th Circuit, as reported in 108 Fed.(2d) 876; that cer-

tiorari was denied on October 14, 1940, by the Supreme Court of the United States, see 85 L.Ed. 60; that all material issues of law and fact raised by the amended complaint herein were raised in the said case of St. Marie vs. United States, and resolved in favor of the defendant; that the only allegations in the amended complaint herein not contained in the complaint in the aforesaid St. Marie case are as follows, in brief, to wit: That the defendant is estopped from denying the plaintiff's right to Patent by representations or misrepresentations of the Secretary of the Interior and the Commissioner of Indian Affairs; (a) That plaintiff was entitled to possession of the land; (b) That a certificate of allotment was evidence of a right to possession; (c) That a trust patent would be issued, and (d) That plaintiff would be justified in making substantial expenditures to improve the property. That assuming the truth of plaintiff's allegations, they are immaterial and raise no justiciable issues of fact or law in that the United States is not bound or estopped by unauthorized and unsanctioned statements or acts of its officers.

FREDERICK H. STEINMETZ

Subscribed and Sworn to before me, this 28 day of November, 1941.

[Seal] R. S. ZIMMERMAN.
Clerk of the United States District Court, Southern District of California.

By J. M. HORN
Deputy.

[Endorsed]: Filed Dec. 1, 1941. [47]

[Title of District Court and Cause.]

No. 1321-R J Civil

NOTICE OF MOTION FOR SUMMARY JUDGMENT

To David D. Sallee and Oliver O. Clark, Attorneys for Plaintiff in the Above-entitled Cause:

Please take notice, that on the 24th day of March, 1941, at the hour of ten o'clock A.M., or as soon thereafter as counsel can be heard, I shall appear before His Honor, Judge Jenney, in the room occupied by him as a court room in the United States Post Office and Court House Building, Los Angeles, California, and move that Summary Judgment be entered herein on the ground that there is no genuine issue as to any material fact and that the defendant is entitled to a judgment as a matter of law in accordance with Rule 56 (b) and (c) of the Federal Rules of Civil Procedure, and in support of said Motion, I shall present affidavits, copies of which are hereto attached.

WM. FLEET PALMER,
United States Attorney
BATES BOOTH,
Special Attorney,
Department of Justice. [48]

[Title of District Court and Cause.]

AFFIDAVIT OF BATES BOOTH

United States of America,
State of California,
County of Los Angeles—ss.

Bates Booth, being first duly sworn, deposes and says:

1. That he is a Special Attorney in the Department of Justice of the United States, and that he is the attorney for the defendant in the above-entitled action;

2. That this is an action to compel the defendant to issue a patent to the plaintiff for certain lands;

3. That your affiant verily believes that there is no genuine issue as to any material fact and that defendant is entitled to judgment as a matter of law;

4. That the subject matter and purpose of the complaint herein, and all the material allegations thereof, are the same as the subject matter, purpose, and allegations of the complaint in the case of St. Marie vs. United States, filed in this district and numbered Equity 918-Y, and decided by this court against the plaintiffs therein, being in the same position as plaintiff herein, and in favor of the defendant United States of America, being the same defendant as in this case; that the decision of this court in St. Marie vs. United States is reported in 24 F. Supp. 237; that the judg- [49] ment of this court was affirmed by the Circuit Court of Appeals for the Ninth Circuit, as reported in 108 F. (2d)

876; that certiorari was denied on October 14, 1940, by the Supreme Court of the United States, 85 L. Ed. 60; that all material issues of law and fact raised by the complaint herein were raised in the said case of St. Marie vs. United States, and resolved in favor of the defendant; that the only allegations in the complaint herein not contained in the complaint in the aforesad St. Marie case are contained in Paragraphs III to VIII inclusive, X to XV inclusive, XVIII to XXIII inclusive, and XXV to XXXI inclusive of the complaint herein; that such allegations are, in brief, that the defendant is estopped from denying the plaintiff's right to patents by representations of the Secretary of the Interior and the Commissioner of Indian Affairs (a) that plaintiff was entitled to possession of the land, (b) that a certificate of allotment was evidence of a right of possession, (c) that a trust patent would be issued, and (d) that plaintiff would be justified in making substantial expenditures to improve the property. That assuming the truth of plaintiff's allegations, they are immaterial and raise no justiciable issues of fact or law in that the United States is not bound or estopped by unauthorized and unsanctioned statements or acts of its officers;

5. That submitted herewith and attached hereto are an affidavit of the Principal Clerk of the Mission Indian Agency, and a certificate of the Acting Commissioner of Indian Affairs of the Department of the Interior; that neither the allotment schedules

alleged in the complaint herein nor any of the certificates of selection alleged in the complaint herein, which certificates of selection specifically show on their face that they are "not valid unless approved by the Secretary of the Interior", were ever approved by the Secre- [50] tary of the Interior as required by law; that therefore no allotment or certificate of selection approved by the Secretary of the Interior was ever made, effected, granted or issued to plaintiff herein or to any member of the tribe under whom he claims;

6. Defendant, therefore, prays that an order be made granting judgment in favor of the defendant herein.

BATES-BOOTH,
Special Attorney,
Department of Justice.

Subscribed and Sworn to before me this 11 day of March, 1941.

[Seal] R. S. ZIMMERMAN,
Clerk U. S. District Court.
Southern District of California. J. M. Horn.

[Endorsed]: Filed Mar. 11, 1941. [51]

[Here follows "Certificate of E. J. Armstrong" which is set out at page 52, and "Affidavit of Carl Spinner" which is set out at page 50.]

In the District Court of the United States in and for the Southern District of California, Central Division.

No. 1321-O'C Civil

LEE ARENAS,

Plaintiff,

vs.

THE UNITED STATES OF AMERICA,

Defendant.

JUDGMENT

This cause having come on to be heard on the 26th day of January, 1942, before the Honorable J. F. T. O'Connor, United States District Judge for the Southern District of California, on the motion of the defendant for Summary Judgment; and

Oliver O. Clark, Esq. appearing as counsel for plaintiff, and Frederick H. Steinmetz, Special Attorney, Lands Division, Department of Justice, counsel for defendant, and the matter having been argued by respective counsel and submitted to the Court; and

It appearing to the Court that issues raised in the Second Amended Complaint dealing with misrepresentations, fraud, and conspiracy on the part of representatives of the defendant, and the possibility of an estoppel as against the defendant arising out of representations made by agents of the defendant are not justiciable for the reason that the defendant, United States of America, may not be bound by the

unauthorized or unlawful or tortious acts of its officers or agents; and [56]

It further appearing that all other issues raised by said Second Amended Complaint have been heretofore decided adversely to the contention of the plaintiff herein by the Circuit Court of Appeals in and for the Ninth Circuit in the case of St. Marie v. United States, reported in 108 Fed. 2d 876, by which decision this honorable Court deems itself bound;

Therefore, It Is Ordered Adjudged and Decreed:

That the motion of defendant for Summary Judgment be granted; that plaintiff take nothing by its Seconded Amended Complaint on file herein; and that defendant have its costs of suit herein incurred in the sum of Fifteen Dollars ($15.00).

Dated: This 6th day of March, 1942.

J. F. T. O'CONNOR
United States District Judge

Presented by:

WM. FLEET PALMER,
United States Attorney.

IRL D. BRETT,
FREDERICK H. STEINMETZ,
Special Attorneys,
Lands Division,
Department of Justice.

By FREDERICK H. STEINMETZ
Attorneys for Defendant

Approved as to Form:
DAVID D. SALLEE,
OLIVER O. CLARK,
HARRY ASHTON.
By OLIVER O. CLARK
Attorneys for Plaintiff.

[Endorsed]: Filed and entered Mar. 6, 1942. [57]

[Title of District Court and Cause.]

NOTICE OF APPEAL FROM JUDGMENT

Notice Is Hereby Given that the Plaintiff herein, Lee Arenas, does hereby appeal to the United States Circuit Court of Appeals, for the Ninth Circuit, from the Judgment heretofore made herein and entered herein on March 6, 1942 in Civil Order Book No. 8, Page 475 thereof, which Judgment was made and entered in favor of said Defendant and upon said Defendant's motion for summary judgment herein.

Dated: June 3rd, 1942.

OLIVER O. CLARK
DAVID D. SALLEE
HARRY ASHTON
ROBERT A. SMITH
By OLIVER O. CLARK
Attorneys for Plaintiff and Appellant.

Mailed copies to attys for appellee Jun 4 1942.)

[Endorsed]: Filed Jun. 4, 1942. [58]

[Title of District Court and Cause.]

BOND ON APPEAL

Whereas, the Plaintiff in the above entitled action has appealed to the Circuit Court of Appeals of the United States of America, Ninth Circuit, from a judgment rendered against him in said action in the above entitled Court, and in favor of the defendant and entered on the 6th day of March, 1942; now, therefore,

In consideration of the premises and of such appeal, we the undersigned, residents, freeholders and householders within the County of Los Angeles, State of California, do hereby jointly and severally undertake and promise on the part of the appellant that the said appellant will pay all damages and costs which may be awarded against him on the appeal, if the judgment appealed from is affirmed, or is modified, or if said appeal is dismissed, not exceeding the sum of $250.00, to which amount we acknowledge ourselves jointly and severally bound.

Dated: June 13, 1942.

S. S. ALDRIDGE
LEON S. ALDRIDGE

We, the undersigned, each of whom has executed the foregoing bond, does hereby state for himself and not one for the other, that he is a resident, freeholder, and householder within the county of Los Angeles, State of California, and is reasonably

worth more [59] than $1,000.00 over and above all of his just debts and liabilities.

Dated: June 13th, 1942.

S. S. ALDRIDGE
LEON S. ALDRIDGE

Subscribed and sworn to before me this 13 day of June, 1942.

[Seal] DAVID D. SALLEE
Notary Public in and for the County of Los Angeles, State of California.

It Is Ordered, that the foregoing bond may be filed herein as Plaintiff's Bond on Appeal herein.

Dated: June 15, 1942.

J. F. T. O'CONNOR
Judge.

[Endorsed]: Filed Jun 15 1942. [60]

[Title of District Court and Cause.]

STATEMENT OF POINTS ON WHICH APPELLANT INTENDS TO RELY ON APPEAL

To the Appellee herein, and to Wm. Fleet Palmer, United States Attorney, and Irl D. Brett and Frederick H. Steinmetz, Special Attorneys, Lands Division, Department of Justice, Attorneys for Appellee:

Appellant intends to rely upon the following points on this appeal:

I.

That the judgment appealed from is erroneous and that the District Court of the United States

for the Southern District of California, Central Division, was without jurisdiction or authority to make or enter said judgment for the reason that the second amended complaint of plaintiff and appellant stated facts sufficient to constitute a cause of action against the defendant and appellee and to entitle plaintiff to the relief thereby sought.

II.

That the judgment appealed from is erroneous for the reason that it clearly appears from the facts alleged in the second amended complaint of plaintiff and appellant that the District Court of the United States for the Southern District of California, Central Division, had jurisdiction of the subject matter set forth in said complaint and that it was the duty of said defendant to issue patents as [61] prayed for in said second amended complaint, and to otherwise perform the acts required of said appellee as set forth in said second amended complaint, and that said defendant appellee is estopped to deny its authority or duty to perform any of said acts or to issue any such patent or to deny to this appellant the relief therein sought by him.

Dated: June 11th, 1942.

OLIVER O. CLARK
DAVID D. SALLEE
HARRY ASHTON and
ROBERT A. SMITH
By OLIVER O. CLARK
Attorneys for Plaintiff and Appellant.

[Endorsed]: Filed Jun. 12, 1942. [62]

[Title of District Court and Cause.]

No. 1321-O'C-Civil

CERTIFICATE OF CLERK TO TRANSCRIPT OF RECORD

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 64 inclusive contain full, true and correct copies of Second Amended Complaint; Motion for Dismissal of Second Amended Complaint, or in the alternative, for Summary Judgment; Notice of Motion for Summary Judgment; Judgment; Notice of Appeal; Bond on Appeal; Statement of Points on which Appellant Intends to Rely on Appeal; Designation of Contents of Record on Appeal and Order Extending Time for Appellant to Prepare and File Record on Appeal which constitutes the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the fees of the Clerk for comparing, correcting and certifying the foregoing record amount to $10.10 and that the said amount has been paid to me by Appellant.

Witness my hand and the seal of the said District Court this 11 day of August, 1942.

[Seal] EDMUND L. SMITH,
Clerk

By THEODORE HOCKE,
Deputy Clerk.

[Endorsed]: No. 10219. United States Circuit Court of Appeals for the Ninth Circuit. Lee Arenas, Appellant, vs. United States of America, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Filed, August 12, 1942.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals for the Ninth Circuit.

LEE ARENAS,

Appellant,

vs.

THE UNITED STATES OF AMERICA,

Appellee.

DESIGNATION OF PRINTED RECORD AND STATEMENT OF POINTS RELIED UPON

To the above named Appellee and to Wm. Flett Palmer, United States Attorney, and Irl D. Brett and Frederick H. Steinmetz, Special Attorneys, Lands Division, Department of Justice, Attorneys for Appellee, and to Paul P. O'Brien, Clerk of the above entitled Court:

Appellant designates the following parts of the record which he thinks necessary for the considera-

tion of the points to be relied upon on this appeal, to-wit:

(1) Second Amended Complaint;

(2) Motion for Dismissal of Second Amended Complaint or in the Alternative for Summary Judgment;

(3) Motion for Summary Judgment;

(4) Judgment;

(5) Notice of Appeal;

(6) Bond on Appeal;

(7) Statement of Points on Appeal.

Appellant intends to rely upon the following points on this appeal:

I.

That the judgment appealed from is erroneous and that the District Court of the United States for the Southern District of California, Central Division, was without jurisdiction or authority to make or enter said judgment for the reason that the second amended complaint of plaintiff and appellant stated facts sufficient to constitute a cause of action against the defendant and appellee and to entitle plaintiff to the relief thereby sought.

II.

That the judgment appealed from is erroneous for the reason that it clearly appears from the facts alleged in the second amended complaint of plaintiff and appellant that the District Court of the United States for the Southern District of California, Central Division, had jurisdiction of the subject matter set forth in said complaint and that it was the duty of said defendant to issue patents as prayed for in

said second amended complaint, and to otherwise perform the acts required of said appellee as set forth in said second amended complaint.

III.

That the judgment appealed from is erroneous for the reason that it appears from the facts alleged in said second amended complaint that said defendant appellee is estopped to deny its authority or duty to perform any of said acts or to issue any such patent or to deny to this appellant the relief therein sought by him.

Dated: August 11th, 1942.

OLIVER O. CLARK
DAVID D. SALLEE
HARRY ASHTON and
ROBERT A. SMITH
By OLIVER O. CLARK
Attorneys for Appellant.

Received copy of within designation, etc., on August 11, 1942.

FREDERICK H. STEINMETZ
Attorney for Plaintiff.

[Endorsed]: Filed Aug. 12, 1942.

[Title of Circuit Court of Appeals and Cause.]

COUNTER DESIGNATION OF RECORD TO BE PRINTED

To the Above Named Appellant and Oliver O. Clark, David D. Sallee, Harry Ashton, and

Robert A. Smith, His Attorneys, and to Paul P. O'Brien, Clerk of the Above Entitled Court:

Appellee specifically designates the following parts of the record which it thinks necessary for the consideration of the points involved in this appeal, to wit:

1. Affidavit of Carl Spinner, dated May 6, 1941.
2. Certificate of E. J. Armstrong, dated March 8, 1941.
3. Affidavit of Frederick H. Steinmetz, dated November 28, 1941.

The above items were attached to and referred to in the Notice of Motion for Dismissal of Second Amended Complaint, or in the Alternative, for Summary Judgment, filed in the Court below on behalf of appellee herein.

Dated: This 20th day of August, 1942.

WM. FLEET PALMER,
United States Attorney,

IRL D. BRETT,
Special Assistant to the
Attorney General.

FREDERICK H. STEINMETZ,
Special Attorney,
Lands Division,
Department of Justice.

By FREDERICK H. STEINMETZ
Attorneys for Appellee

[Endorsed]: Filed Aug. 21, 1942.

No. 10219

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

LEE ARENAS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Upon Appeal from the District Court of the United States
for the Southern District of California,
Central Division

**PROCEEDINGS HAD IN THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT**

United States Circuit Court of Appeals
For the Ninth Circuit

Excerpt from Proceedings of Monday, March 8, 1943.

Before: Wilbur, Denman and Mathews, Circuit Judges.

[Title of Cause.]

ORDER OF SUBMISSION

Ordered appeal herein argued by Mr. Oliver O. Clark, counsel for the appellant, and by Mr. Norman McDonald, Special Assistant to the Attorney General, counsel for appellee, and submitted to the court for consideration and decision.

United States Circuit Court of Appeals
For the Ninth Circuit

Excerpt from Proceedings of Wednesday, June 30, 1943.

Before: Wilbur, Denman and Mathews, Circuit Judges.

[Title of Cause.]

ORDER DIRECTING FILING OF OPINION AND FILING AND RECORDING OF DECREE

By direction of the Court, Ordered that the typewritten opinion this day rendered by this Court in above cause be forthwith filed by the clerk, and that a decree be filed and recorded in the minutes of this Court in accordance with the opinion rendered.

[Title of Circuit Court of Appeals and Cause.]

Upon appeal from the District Court of the United States for the Southern District of California, Central Division.

OPINION AND CONCURRING OPINION

Before: Wilbur, Denman and Mathews, Circuit Judges.

Wilbur, Circuit Judge:

The appellant is a member of the Agua Caliente Band of Mission Indians of the Palm Springs Reservation in Riverside, California. He claims the right to certain land described in his complaint on the theory that the same has been allotted to him by the Secretary of the Interior. He admits that the points raised by him were disposed of by this court adversely to his claim in the case of St. Marie v. United States, 108 F.2d., 876. He claims, however, that that decision was in error and also that this case may be distinguished from the former decision upon the ground that it is admitted in the case at bar "that there had been a determination that the Indians in question were sufficiently advanced so as to comply with the act" under which the allotments were made. That case was predicated upon the theory that until the Secretary of Interior approved the alleged allotments there was no right thereto vested in the alleged allottee. In this case we follow the decision heretofore made in the St. Marie case.

The appellant also urges that there is an estoppel on the part of the federal authorities to question the

validity of the alleged allotment to the appellant. There is no merit in this contention. Utah Pr. & Lt. Co. v. United States, 243 U.S. 389; Yuma v. Schlecht, 262 U.S. 138.

Affirmed.

Denman, Concurring:

I concur. Congress by the Act of June 18, 1934, 25 U.S.C.A. 461, has taken from the Secretary of Interior any power he theretofore had to allot lands, except with the consent of the tribe, such consent not here known to have been given. 25 U.S.C.A. 478 (a). Unless Arenas had some legal or equitable right to the lands he claims, of which it would be a violation of the Fifth Amendment to deprive him, his claim here is invalid.

The Act of March 2, 1917, 39 Stat. 969, 976, does no more than change the acreage which the Secretary may allot under the Mission Indian Act of January 12, 1891, 26 Stat. 712. Under the latter Act the Indian has no such right of selection for the allotment and no such property right in the selected land as was given the Indians under the General Allotment Act of 1887, or its amendments, 25 U.S.C.A. 331, 332, and as recognized in Sec. 1 of the Act of 1894, 31 Stat. 760, 25 U.S.C.A. 345, and in such cases as Hy-Yutse-Mil-Kin v. Smith, 194 U.S. 401.

Under the Mission Indian Act a selection, made by the Secretary as a step in the allotment of land to some Indian, was not binding on the government. The Secretary could have made some other selection

as a substitute for the same Indian. Only when an allotment was made did the allottee acquire any right in the land. Since there was no such action in Arenas' favor prior to 1934, he has no property right of any kind of which it could be construed that the Constitution forbids taking from him by the 1934 Act.

[Endorsed]: Opinion and Concurring Opinion. Filed Jun. 30, 1943. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals
For the Ninth Circuit

No. 10219

LEE ARENAS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

DECREE

Appeal from the District Court of the United States for the Southern District of California, Central Division.

This Cause came on to be heard on the Transcript of the Record from the District Court of the United States for the Southern District of California, Central Division and was duly submitted.

On Consideration Whereof, it is now here ordered, adjudged, and decreed by this Court, that the judgment decree of the said District Court in this cause be, and hereby is, affirmed.

[Endorsed]: Filed and entered June 30, 1943. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals
For the Ninth Circuit

Excerpt from Proceeding of Wednesday, August 4, 1943.

Before: Wilbur, Denman and Mathews,
Circuit Judges.

[Title of Cause.]

ORDER DENYING PETITION
FOR REHEARING

Upon consideration thereof, and by direction of the Court, Ordered that the petition of appellant, filed July 28, 1943, and within time allowed therefor by rule of court for a rehearing of above cause be, and hereby is denied.

[Title of Circuit Court of Appeals and Cause.]

CERTIFICATE OF CLERK, U. S. CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT, OF RECORD CERTIFIED UNDER RULE 38 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES.

I, Paul P. O'Brien, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing Seventy-Seven (77) pages, numbered from and including 1 to and including 77, to be a full, true and correct copy of the entire record of the above-entitled case in the said Circuit Court of Appeals, made pursuant to request of counsel for the appellant, and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 29th day of Sept. 1943.

[Seal] PAUL P. O'BRIEN,
Clerk.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed December 20, 1943

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 463

LEE ARENAS,

Petitioner,

vs.

THE UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

JOHN W. PRESTON,
Counsel for Petitioner.

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SUBJECT INDEX.

TABLE OF CASES CITED.

TEXTS CITED.

STATUTES CITED.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 463

LEE ARENAS,

Petitioner,

vs.

THE UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, Lee Arenas, appellant in the Court below (R. 61-64), respectfully prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Ninth Circuit entered in the above entitled cause (R. 59) on the 30th day of June, 1943. A petition for rehearing was filed on the 28th day of July, 1943 (R. 77), and a rehearing was denied by said Court on the 4th day of August, 1943 (R. 77), and the judgment of said Court is final.

Opinions Below.

The Circuit Court of Appeals for the Ninth Circuit rendered one opinion in the case, which is not yet reported. A copy of said opinion is set forth in the Appendix, p. 19.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 240 of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. A. Sec. 347 (a)).

Statutes Involved.

The statutes involved are: (1) The Act of January 12, 1891 (Ch. 65, 26 Stat. 712), known as the Mission Indians Act; (2) The General Allotment Act of February 8, 1887 (Ch. 119, 24 Stat. 388, 25 U. S. C. A., Sec. 331, et seq.); (3) The Act of March 2, 1917 (Ch. 146, 39 Stat. 969, 976), amending said Mission Indians Act; and (4) The Act of February 14, 1923 (Ch. 76, 42 Stat. 1246, 25 U. S. C. A., Sec. 335), making the General Allotment Act applicable to the Mission Indians. Pertinent parts of these Acts are set forth in the Appendix, pp. 20-23. Other statutes, incidental to the foregoing, will be referred to herein.

Summary Statement.

Petitioner brought this suit in the District Court of the United States for the Southern District of California to secure a judicial determination of his right to an allotment of tribal lands, under Section 345 of Title, 25 U. S. C. A. (31 Stat. 760) (R. 2-48). The complaint alleges: That petitioner is a full blood Mission Indian and is a member of the Agua Caliente (Palm Springs) Band of Mission Indians of California; that he was born and has ever since lived upon the Palm Springs Indian Reservation, and has at all times

kept and maintained his tribal relationship, membership and enrollment in said Agua Caliente (Palm Springs) Band of Mission Indians; that he has at all times kept and maintained his home and residence separate and apart from any tribe of Indians on said Reservation, and throughout his entire life has adopted the habits, ways and methods of civilized life (R. 2-4); that he is able to read and write the English language, possesses a degree of education and intelligence above the average of any race, and since February 8, 1887, has been entitled to all of the rights, privileges and immunities of a citizen of the United States and of the heritage of his Indian ancestry (R. 2-3); and that he is entitled to a trust patent to certain lands, specifically described in the complaint, from the United States of America (R. 47). The complaint further alleges that, in accordance with Acts of Congress (Appendix pp. 20-23) the Secretary of the Interior, on or about June 7, 1921, determined that the Palm Springs Band of Mission Indians, including petitioner, were so far advanced in civilization and had so far adopted the habits and ways of civilized life as to be capable of owning and managing land in severalty (R. 3-4); that shortly thereafter said Secretary of the Interior appointed a Special Allotting Agent to make or cause to be made allotments of land situated within the Palm Springs Indian Reservation to such of the Mission Indians, including petitioner, as made or might make selections for allotment in severalty to the duly and regularly enrolled members of said Band (R. 3-5); that, pursuant to said action and said Acts of Congress, petitioner selected the lands described in the complaint (R. 4) and said Special Allotting Agent thereupon allotted the lands so selected to petitioner and issued to petitioner a certificate of "Selection for Allotment" covering said lands (R. 4-9) and in evidence thereof inscribed said selection for allotment on the Official Special Allotment Schedules, and thereafter certified said selection

for allotment, and other such selections, and said Schedules to the Secretary of the Interior (R. 4-5); and that said Secretary thereafter, on or about October 26, 1923, instructed said Special Allotting Agent to put petitioner and other allottees in physical possession of the properties selected by them, respectively, for the use and enjoyment thereof (R. 10-11) for agricultural and other purposes. The complaint further alleges that thereafter petitioner took sole and exclusive possession of the lands selected by and allotted to him by said Special Allotting Agent, and with the knowledge and consent of and upon encouragement by said Special Allotting Agent, petitioner made costly and extensive improvements upon said lands of the approximate value of Fifteen Thousand Dollars ($15,000.00) which otherwise he would not have made, and that by reason thereof the respondent United States of America is estopped to deny that petitioner acquired and now has equitable title to said lands (R. 11-15). Petitioner prayed that it be adjudged and decreed that he is vested with equitable title to said lands, that he is entitled to a Trust Patent to said lands, that a copy of such judgment and decree of the Court be certified to the Secretary of the Interior of the United States, and for his costs and such other and further relief as justice and equity may require (R. 44-48).

The United States of America thereupon filed motion for dismissal of said complaint or, in the alternative, for a summary judgment, upon the files, records and pleadings in this case and upon the files, records, pleadings and further proceedings in the case of *Genevieve St. Marie* v. *United States of America, et al.*, filed in the same District, numbered Equity 918-Y therein, reported in 24 F. Supp. 237, and, upon appeal reported in 108 F. 2d 876. Upon a hearing of said motion to dismiss, or for summary judgment, the District Court granted the motion for a summary judgment

upon the ground that the issues raised herein had been previously decided adversely to petitioner's contention in *St. Marie* v. *United States, supra* (R. 59-60). Petitioner appealed from said judgment to the Circuit Court of Appeals for the Ninth Circuit (R. 61-69) and said Court, in a one-page opinion, affirmed the judgment of the District Court (Appendix p. 19).

Holding of the Circuit Court of Appeals.

The Circuit Court of Appeals held that its decision in the case of *St. Marie* v. *United States*, 108 F. (2d) 876, must be followed, and that said decision held "that until the Secretary of the Interior approved the alleged allotments there was no right thereto vested in the alleged allottee." The Court further held that there can be no estoppel on the part of the federal authorities to question the validity of the alleged allotment to petitioner, citing *Utah Power & Light Co.* v. *United States*, 243 U. S. 389, 61 L. Ed. 791, and *Yuma County Water Users' Association* v. *Schlecht*, 262 U. S. 138, 67 L. Ed. 909, in support thereof. Petitioner respectfully asserts that said holding is contrary to well-recognized principles of law.

The Questions Involved.

The principal questions here involved are:

1. The decision of the Circuit Court of Appeals is contrary to the applicable Acts of Congress and to the decisions of this Court and other Circuit Courts of Appeals.

2. Under the facts pleaded in the complaint the United States of America is estopped to deny the power and the duty of the Secretary of the Interior to issue a trust patent to petitioner to the lands selected for allotment by him.

3. The United States of America is estopped by reason of the laches of the Secretary of the Interior, in withholding

formal approval of petitioner's selection for allotment, to deny petitioner's equitable right and title to the lands selected by him.

4. The law does not authorize the Secretary of the Interior to withhold a trust patent from a qualified allottee who has established an equitable right thereto.

5. The petitioner has done everything which the Acts of Congress and law require him to do to attain his right to a trust patent to the lands selected by him for allotment, and the neglect or failure of the Secretary of the Interior to issue such patent does not defeat petitioner's right thereto.

Reasons Relied On for the Allowance of the Writ.

I.

The Decision of the Circuit Court of Appeals In This Case was Rendered upon the sole Authority of its Decision in St. Marie v. *United States, 108 F. 2d 876, and That Decision is in Conflict With the Applicable Acts of Congress and the Decision of This Court and Other Circuit Courts of Appeals.*

A.

(Errors below in holding that *St. Marie* v. *United States*, 108 F.2d 876, is controlling of this case.)

1. *The St. Marie case, supra, is clearly distinguishable from the case at bar.*

Reference to the one-page opinion of the Circuit Court of Appeals shows clearly that the decision of that Court rested almost entirely upon its decision in the *St. Marie* case, *supra*. The *St. Marie* case is distinguishable from the case at bar. Moreover, the decision of the Circuit Court of Appeals in the *St. Marie* case is in conflict with applicable law.

In the *St. Marie* case, *supra*, the Circuit Court of Appeals held that "there had been no determination that the (Mission) Indians in question were sufficiently advanced so as to comply with the act, and the approval of the Secretary was lacking, 24 F. Supp. 240." (108 F. 2d 876, 879.) This conclusion was reached by the District Court *after a trial on the merits.* The Circuit Court of Appeals affirmed the judgment of the District Court.

In the case at bar there was no trial on the merits; instead, a summary judgment was rendered upon motion of respondent for dismissal of the complaint or for a summary judgment (R. 48-49, 59-60). Such a motion admits the truth of the facts alleged in the complaint. The complaint in this case alleges inter alia: That "the Secretary of the Department of the Interior * * * did, on or about, to wit, the 7th day of June, 1921, determine that, in his opinion, the aforesaid Band of Mission Indians, including complainant, were so far advanced in civilization and had so far adopted the life, habits and ways of civilized life as to be capable of owning and managing lands in severalty" (R. 3-4); and that, pursuant to such determination and the Act of January 12, 1891, as amended, the Secretary of the Interior appointed one H. E. Wadsworth Special Allotting Agent at Large for the Mission Indians of California, and "that said H. E. Wadsworth, as such Special Allotting Agent at Large, of the Department of the Interior, surveyed and classified, the lands of said Band of Mission Indians, contained within the limits and boundaries of said Indian Reservation, *and did allot to your complainant in severalty* * * * the following * * *" (R. 4-9). (Italics ours.) It thus appears that there was a determination by the Secretary of the Interior that Petitioner had capacity to own and manage lands in severalty. But, even if the Secretary had not made such a determination, the Congress had already made the necessary determina-

tion, by the Act of March 2, 1917 (Appendix p. 22) and had thereby imposed upon the Secretary the mandatory duty of making allotments in severalty to the Mission Indians. (Ibid.)

It is clear from the foregoing that the *St. Marie* case, even if sound, is distinguishable from the case at bar.

2. *The decision of the Circuit Court of Appeals for the Ninth Circuit in St. Marie v. United States, 108 F. 2d 876, is in Conflict with the Applicable Acts of Congress and the Decisions of this Court and of other Circuit Courts of Appeals.*

The decision of the Circuit Court of Appeals in *St. Marie v. United States*, 108 F. 2d 876, was by a divided Court, Judge Garrecht dissenting from the majority decision (108 F. 2d 881-897) in a very able and comprehensive opinion wherein the various applicable Acts of Congress and Court decisions are collated, discussed and applied to the facts of that case. Much of that dissenting opinion is applicable to the case at bar. It is especially valuable in its discussion and construction of Congressional legislation providing for allotment of lands in severalty to the Mission Indians, and its reasoning is sound and convincing.

The Mission Indian Act (Act of January 12, 1891)—(see Appendix pp. 20, 21) provides (Sections 2 and 3) for the selection of reservations by commissioners appointed for that purpose for the various bands of Mission Indians of California, for the certification of such selections to the Secretary of the Interior, and, if no objections are filed, to the issuance of a patent to each band in trust for a period of twenty-five (25) years. Section 4 of the Act (Appendix p. 21) provides "that whenever any of the Indians * * * shall, in the opinion of the Secretary of the Interior, be so advanced in civilization as to be capable of owning and managing land in severalty, the Secretary * * * may

cause allotments to be made to such Indians * * *." From these provisions it is apparent that the issuance of patents to individual Mission Indians rested within the discretion and judgment of the Secretary during said period of twenty-five years. Some individual allotments were made under these provisions of the Act.

Shortly after the expiration of the twenty-five year period prescribed in the Act, during which the United States should hold in trust for each Band of Mission Indians the lands selected by the commissioners, the Congress amended the Mission Indian Act by the Act of March 2, 1917 (Appendix, p. 22) as follows: "Provided, that *the Secretary of the Interior be, and he is hereby, authorized and directed to cause allotments to be made to the Indians belonging to and having tribal rights on the Mission Indian reservations in the State of California,* in areas as provided in section seventeen of the Act of June twenty-fifth, nineteen hundred and ten * * * instead of as provided in section 4 of the Act of January twelfth, eighteen hundred and ninety-one. * * *" (Italics ours.) This amendment, as indicated by the italicized portion thereof, *supra,* shows clearly: (1) That the Congress itself thereby determined that the Mission Indians were sufficiently advanced in civilization to warrant allotments to them in severalty, and (2) that the Secretary of the Interior no longer had discretion but that thereafter it was his mandatory duty to make allotments and issue patents to these Indians in severalty. The majority opinion of the Circuit Court of Appeals (108 F. 2d 881) refers to the foregoing interpretation of the Act of March 2, 1917, but makes no decision thereon, merely saying: "Since this is not a proceeding to compel action by the Secretary, we need not decide which meaning is correct."

Following the passage of the amendatory Act of March 2, 1917, the Secretary of the Interior appointed a Special

Allotting Agent to survey and make selections for allotment of lands in severalty for the Mission Indians, and such surveys and selections were duly made, and certificates issued to the Indians accordingly. These acts of the Secretary and the Special Allotting Agent are utterly meaningless, except as being in performance of the mandatory duties imposed upon the Secretary by said Act. The very purpose of the Mission Indian Act and the Act of March 2, 1917, *supra*, that is, to allot lands to the Mission Indians in severalty, was thus carried out.

That the Act of March 2, 1917, imposed a mandatory duty, and not mere discretion, upon the Secretary of the Interior to make allotments and issue patents in severalty to the Mission Indians is clearly indicated in a communication from the Secretary of the Interior, signed by the Assistant Secretary, to the Attorney General of the United States, saying:

> "As to the allotment feature of the situation, we are confronted with the provision in the act of March 2, 1917 (39 Stat. 976), amending Section 3 of the act of January 12, 1891 (26 Stat. 712), so as to *direct* the Secretary of the Interior to make allotments to the Indians of the Mission Reservations in California in areas as provided in section 17 of the act of June 25, 1910 (36 Stat. 859), rather than as provided in section 4 of the act of January 12, 1891, supra; in other words, *usually regarded as mandatory rather than discretionary legislation.*" (Italics ours.)

See dissenting opinion, 108 F. 2d 890.

The Attorney General, in this connection, wrote to the United States District Attorney at Los Angeles in part as follows:

> "Moreover, in view of the present status of the law on the subject it is not quite certain whether the Government could successfully resist the action of these

or any other individual members of the tribe (Mission Indians) for allotments within said reservation." (Ibid.)

Furthermore, the certification of the allotment schedule by the Special Allotting Agent shows that the Act of March 2, 1917, as well as the General Allotment Act, was followed in making the selections for allotment. That certification is as follows:

"Palm Springs, California,
"May 9, 1927.

"This is to certify that listings of allotment selections for the Indians of Palm Springs (Agua Caliente) Indian Reservation, Calif., began on June 1, 1923, and the same were completed on May 9, 1927; and that it is further certified that the allotments shown hereon were made in accordance with the provisions of the act of Congress of February 8, 1887 (24 Stat. L. 388), as amended by the act of June 25, 1910 (36 Stat. L. 855), and supplemented by the act of March 2, 1917 (39 Stat. L. 969-76).

"H. E. WADSWORTH,
"*Special Allotting Agent.*
"C. L. ELLIS,
"*Superintendent Mission Indian Agency, California.*" (108 F. 2d 879.)

The wording of the Acts of Congress and the interpretation placed thereon by Administrative officers, *supra*, show that the decision of the Circuit Court of Appeals in *St. Marie* v. *United States* is in conflict with said Acts, is unsound, and should not have been followed in the case at bar.

B.

(Error below in holding that the federal authorities are not estopped to question the validity of petitioner's right and equitable title to the lands selected for allotment by him.)

The Court below held that there is no merit in the estoppels pleaded by petitioner in his complaint, citing in support thereof *Utah Pr. & Lt. Co.* v. *United States*, 243 U. S. 389, 61 L. Ed. 791, and *Yuma* v. *Schlecht*, 262 U. S. 138, 67 L. Ed. 909. These cases are not in point, but rest upon the proposition that "the United States is neither bound nor estopped by acts of its officers or agents in entering into an arrangement or agreement to do or cause to be done *what the law does not sanction or permit.*" (*Utah Lt. & Pr. Co.* v. *United States, supra.*) (Italics ours.) But in the case at bar the law (Acts of Congress, *supra*) not only *sanctioned but directed* the Secretary of the Interior to do the acts relied on by petitioner for estoppel. The two cases cited, *supra*, do not support the Court's holding. See *United States* v. *Big Bend Transit Co.*, 42 F. Supp. 459, 474; *United States* v. *City and County of San Francisco*, 310 U. S. 16, 60 S. Ct. 749, 757, 84 L. Ed. 1050.

It is conceded that the United States may not be estopped to exercise its sovereign powers. But, in respect of the acts and omissions complained of in this case, the United States was acting, not as a sovereign, but as a fiduciary or trustee for the Mission Indians, including petitioner. Under the authorities, it may be estopped in the latter capacity. (See, *19 Am. Jur.* 822, sec. 169; *31 C. J. S.* 411, sec. 140; *10 R. C. L.* 704, 705, secs. 31, 32; *Bronson* v. *Wirth*, 17 Wall. 32, 21 L. Ed. 566; *United States* v. *Denver & R. G. W. R. Co.*, 16 F. 2d 374; *United States* v. *Big Bend Transit Co.*, 42 F. Supp. 459; *19 Harvard L. Rev.* 127; *State* v. *Horr*, 165 Minn. 1, 205 N. W. 444.) The rule applicable here is thus stated in *31 C. J. S. 411*, sec. 140:

> "It has been broadly stated that there can be no estoppel against the United States or a State. Nevertheless, subject to limitations and exceptions considered supra section 138, it is well established that in a 'proper case' the doctrine of equitable estoppel may

apply as against the federal and state governments, and that under circumstances which would estop a private individual an estoppel may be asserted against the United States, a state, or a state agency, commission, or officer."

In *United States* v. *Denver & R. G. W. R. Co.* (8 Cir.), 16 F. 2d 374, *supra*, it was said:

> "The equitable claims of the state or of the United States are no stronger than those of an individual under like circumstances, and a state or the United States may waive a claim and be estopped from the assertion of a claim under circumstances that would estop an individual from the assertion of a similar claim. *State of Iowa* v. *Carr* (C. C. A.), 191 F. 257, 266; *United States* v. *Chandler-Dunbar Water Power Co.* (C. C. A.), 152 F. 25, 41; *United States* v. *Debell* (C. C. A.), 227 F. 775, 779; *Rannels* v. *Rowe* (C. C. A.), 145 F. 296, 301; 1 Pomeroy's Eq. Jur., Sec. 451."

To like effect are *Hannibal & St. Jo. R. R. Co.* v. *Smith*, 9 Wall. 95, 19 L. Ed. 599; *Van Wyck* v. *Knevals*, 106 U. S. 367, 27 L. Ed. 201, 203; *2 Land Dec.* 166; *Bonifer* v. *Smith*, 166 Fed. 846, 849.

The following allegations of fact in the complaint fully support the estoppels pleaded: Determination by Secretary of the Interior that Mission Indians are capable of owning and managing their lands in severalty; order appointing and authorizing Special Allotting Agent to survey or cause to be surveyed Mission Indian lands and to select or cause to be selected for allotment such lands in severalty to the members of the Palm Springs Band of Mission Indians; the actual survey and selection of said lands; the inscribing of the selections made upon the Official Special Allotment Schedules; the certification of said Schedules to the Secretary of the Interior; the issuance of Certificates of "Selections for Allotment" to the several Mission Indians mak-

ing such selections, including petitioner; representations and statements to petitioner by Special Allotting Agent that "patent in trust would issue to complainant (petitioner) covering said parcels of land * * * by reason of said selection, scheduling and certification for allotment" (R. 12); placing petitioner in physical possession of said lands, upon order of the Secretary of the Interior; permitting and encouraging petitioner to make improvements on lands selected by him of the value of $15,000.00, which otherwise he would not have made; occupancy of said selected lands by petitioner since October 26, 1923, under said proceedings and orders; and thereafter negligence and failure of Secretary of the Interior to issue patent in trust to petitioner as authorized and directed by law (Act of Congress, March 2, 1917, amending Mission Indian Act, 39 Stat. 969, 976), providing: "That the Secretary of the Interior be, and he is hereby, *authorized and directed to cause allotments to be made to the Indians belonging to and having tribal rights on the Mission Indian reservations of the State of California* * * *" (Italics ours.)

In this connection, the estoppels pleaded by petitioner also distinguish the case at bar from *St. Marie* v. *United States, supra.*

II.

The Law Does Not Authorize the Secretary of the Interior to Withhold a Trust Patent From a Qualified Allottee Who Has Established a Vested Equitable Right Thereto.

The determination made and the action taken by the Secretary of the Interior and the procedure followed in the surveying, selection, scheduling and certifying of petitioner's allotment was the inception of an equitable title which vested in petitioner, and of which he cannot now be deprived by failure of the Secretary to act. This equitable title is given added strength by the subsequent acts and

omissions of the Secretary over a period of many years, as hereinbefore set forth. See *Smith* v. *Bonifer*, 154 Fed. 883, 887; *Wyoming* v. *United States*, 255 U. S. 489, 65 L. Ed. 742; *Payne* v. *New Mexico*, 255 U. S. 367, 65 L. Ed. 680; *Payne* v. *Central P. R. Co.*, 255 U. S. 228, 65 L. Ed. 598; *Raymon Bear Hill*, 52 Land Dec. 688, 690; *Parr* v. *United States*, 153 Fed. 468; *Thomason* v. *Wellman & Rhoades*, 206 Fed. 895; *Lytle* v. *Arkansas*, 9 Howard 314, 13 L. Ed. 153; *Beam* v *United States*, 162 Fed. 260; *Barney* v. *Dolph*, 97 U. S. 652, 24 L. Ed. 1063; *Cornelius* v. *Kessel*, 128 U. S. 456, 32 L. Ed. 482; *Ballinger* v. *Frost*, 216 U. S. 240, 54 L. Ed. 464; *Millet* v. *Bilby*, 110 Okla. 241, 237 Pac. 859; *Reynolds* v. *Brooks*, 49 Okla. 188, 195, 152 Pac. 411, 413.

A.

(In the enactment of the Mission Indian Act and the Amendments thereto (Act of January 12, 1891, Ch. 65, 26 Stat. 712; Act of March 2, 1917, Ch. 146, 39 Stat. 969, 976) the Congress obviously intended that when an allotment was selected by and scheduled to a qualified Mission Indian, under the supervision of the Secretary of the Interior, there was thereby vested an equitable right in the allottee of which he could not be deprived by the failure of the Secretary to comply with the direction of these statutes.)

It should be remembered the petitioner was *entitled to land* in the Palm Springs Indian Reservation *as a matter of right*. Selection of particular lands was not the inception of his right *but of his title thereto*. See *Hooks* v. *Kennard*, 28 Okla. 457, 463, 114 Pac. 744, 746; *Reynolds* v. *Brooks*, 49 Okla. 188, 195, 152 Pac. 411, 413; and *Parr* v. *United States*, 153 Fed. 468, where it was said:

> "The word 'allot' as used in an act for the allotment of lands to Indians in severalty * * * is not a term of sale or grant, *but of apportionment of that to which the parties are entitled as of right.*" (Italics ours.)

And, in *Millet* v. *Bilby*, 101 Okla. 241, 237 Pac. 859, the Court said:

> "*The right to the allotment already existed*, and the United States, by the allotment or certificate, merely set aside to the Indian the land that was rightfully his, after he had made his selection." (Italics ours.)

The allotment certificate, issued by the Special Allotting Agent to petitioner, the inscription thereof upon the allotment schedules, and the certification of these schedules to the Secretary of the Interior constituted a setting aside to petitioner of the lands selected by him as a duly qualified member of the Palm Springs Band of Mission Indians. Petitioner's equitable title to said lands thus became vested. The fact that the Secretary of the Interior has not executed formal approval or issued the trust patent, in no way affects petitioner's equitable rights in the lands selected. *Thomason* v. *Wellman & Rhoades*, 206 Fed. 895, 897; *Mullen* v. *United-States*, 224 U. S. 457, 56 L. Ed. 834. The execution and delivery of the patent, after the right to it is complete, are mere ministerial acts of the Secretary of the Interior. See cases cited, supra. It has long been the law that "when the right to a patent once became vested * * * it was equivalent, so far as the government was concerned, to a patent actually issued." *Barney* v. *Dolph, supra; Simmons* v. *Wagner*, 101 U. S. 260, 25 L. Ed. 910; *Stark* v. *Starr*, 6 Wall. 402, 18 L. Ed. 925; *Ballinger* v. *Frost, supra; Wallace* v. *Adams*, 143 Fed. 721, 74 C. C. A. 540; *Thomason* v. *Wellman & Rhoades, supra.*

B.

(Petitioner has done everything which the law required him to do, and his equitable right and title to the lands selected, surveyed, scheduled and certified cannot be defeated by the failure or neglect of the Secretary of the Interior to act.)

See, *Pomeroy* v. *Wright*, 2 Land Dec. 166; *Lytle* v. *Arkansas*, 9 Howard 314, 333, 13 L. Ed. 153, 160; *Hannibal & St. Jo. R. R. Co.* v. *Smith*, 9 Wall. 95, 19 L. Ed. 599; *Van Wyck* v. *Knevals*, 106 U. S. 367, 27 L. Ed. 201, 203.

In *Lytle* v. *Arkansas*, *supra*, this Court states the rule, here invoked, as follows, p. 333 (L. Ed. 160):

> "It is a well-established principle, that where an individual in the prosecution of a right does everything which the law requires of him to do, and he fails to attain this right by the misconduct or neglect of a public officer, the law will protect him."

To like effect are *Pomeroy* v. *Wright*, *supra*; *Hannibal* v. *Smith*, *supra*, and *Van Wyck* v. *Knevals*, *supra*; *Barney* v. *Dolph*, 97 U. S. 652, 24 L. Ed. 1063; *Cornelius* v. *Kessel*, 128 U. S. 456, 32 L. Ed. 482; *Ballinger* v. *Frost*, 216 U. S. 240, 54 L. Ed. 464; *United States* v. *Payne*, (9 Cir.) 284 Fed. 827; *Payne* v. *New Mexico*, 255 U. S. 367, 65 L. Ed. 680; and *Smith* v. *Bonifer*, 132 Fed. 889, 891, where it was further said that "it is a familiar principle that 'where one offers to do everything upon which a right depends, and is prevented by the other side, his right shall not be lost by his failure'. The *Yosemite* case, 15 Wall. 91, 21 L. Ed. 82."

The rule stated in these cases, *supra*, was applied in the case of *Raymond Bear Hill*, 52 L. D. 688, 690, as follows:

> "* * * it may be said generally that it is well settled that a claimant to public land who has done all that is required under the law to perfect his claim, acquires a right against the Government and that his right to a legal title is to be determined as of that time. This rule is based on the theory that by virtue of his compliance with the requirements, he has an equitable title to the land; that in equity it is his and the Govrenment holds it in trust for him, although no legal title passes until patent issues. Wyoming *v.* United States (255 U. S. 489); Payne *v.* New Mexico (255 U. S. 367); Payne *v.* Central Pacific Railway Company (255 U. S. 228).

> It would seem to follow that what is true concerning the equitable rights of an entryman to public land is also true as to the equitable rights of a qualified Indian to an allotment of tribal or reservation land. In fact, the position of a qualified Indian is stronger than that of an entryman of public land, for the reason that he has an inherent interest in the common property of his tribe."

See also *Hy-Yu-Tse-Mil-Ken* v. *Smith*, 194 U. S. 401, 48 L. Ed. 1039.

Your petitioner presents to this Court, and files herewith a duly certified transcript of the entire record of the case, as the same appears in the Circuit Court of Appeals for the Ninth Circuit.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari may be issued out of and under the seal of this Court to the Circuit Court of Appeals for the Ninth Circuit, to the end that the judgment of said Circuit Court of Appeals for the said Circuit may be reviewed by this Honorable Court.

LEE ARENAS,
Petitioner,
By JOHN W. PRESTON,
Counsel for Petitioner.

APPENDIX.

Opinion of the Circuit Court of Appeals for the Ninth Circuit. (Omitting caption.)

"Upon appeal from the District Court of the United States for the Southern District of California, Central Division.

"Before Wilbur, Denman and Mathews, Circuit Judges.

"WILBUR, *Circuit Judge:*

"The appellant is a member of the Agua Caliente Band of Mission Indians of the Palm Springs Reservation in Riverside, California. He claims the right to certain land described in his complaint on the theory that the same has been allotted to him by the Secretary of the Interior. He admits that the points raised by him were disposed of by this court adversely to his claim in the case of St. Marie *v.* United States, 108 F. 2d 876. He claims, however, that that decision was in error and also that this case may be distinguished from the former decision upon the ground that it is admitted in the case at bar 'that there had been a determination that the Indians in question were sufficiently advanced so as to comply with the act' under which the allotments were made. That case was predicated upon the theory that until the Secretary of Interior approved the alleged allotments there was no right thereto vested in the alleged allottee. In this case we follow the decision heretofore made in the St. Marie case.

"The appellant also urges that there is an estoppel on the part of the federal authorities to question the validity of the alleged allotment to the appellant. There is no merit in this contention. Utah Pr. & Lt. Co. *v.* United States, 243 U. S. 389; Yuma *v.* Schlecht, 262 U. S. 138.

"Affirmed.

"DENMAN, Concurring:

"I concur. Congress by the Act of June 18, 1934, 25 U. S. C. A. 461, has taken from the Secretary of Interior any power he theretofore had to allot lands, except with

the consent of the tribe, such consent not here known to have been given. 25 U. S. C. A. 478(a). Unless Arenas had some legal or equitable right to the lands he claims, of which it would be a violation of the Fifth Amendment to deprive him, his claim here is invalid.

"The Act of March 2, 1917, 39 Stat. 969, 976, does no more than change the acreage which the Secretary may allot under the Mission Indian Act of January 12, 1891, 26 Stat. 712. Under the latter Act the Indian has no such right of selection for the allotment and no such property right in the selected land as was given the Indians under the General Allotment Act of 1887, or its amendments, 25 U. S. C. A. 331, 332, and as recognized in Sec. 1 of the Act of 1894, 31 Stat. 760, 25 U. S. C. A. 345, and in such cases as Hy-Yutse-Mil-Kin *v.* Smith, 194 U. S. 401.

"Under the Mission Indian Act a selection, made by the Secretary as a step in the allotment of land to some Indian, was not binding on the government. The Secretary could have made some other selection as a substitute for the same Indian. Only when an allotment was made did the allottee acquire any right in the land. Since there was no such action in Arenas' favor prior to 1934, he has no property right of any kind of which it could be construed that the Constitution forbids taking from him by the 1934 Act.

"(Endorsed:) Opinion and Concurring Opinion. Filed Jun. 30, 1943. Paul P. O'Brien, Clerk."

Mission Indian Act.

The Act of January 12, 1891 (Ch. 65, 26 Stat. 712), omitting caption, provides in part as follows:

> "Sec. 2. That it shall be the duty of said commissioners to select a reservation for each band or village of the Mission Indians residing within said State, which reservation shall include, as far as practicable, the lands and villages which have been in the actual occupation and possession of said Indians, and which shall be sufficient in extent to meet their just requirements, which selection shall be valid when approved by the President and Secretary of the Interior * * *

"Sec. 3. That the commissioners, upon the completion of their duties, shall report the result to the Secretary of the Interior, who, if no valid objection exists, shall cause a patent to issue for each of the reservations selected by the commission and approved by him in favor of each band or village of Indians occupying any such reservation, which patents shall be of the legal effect, and declare that the United States does and will hold the land thus patented, subject to the provisions of section four of this act, for the period of twenty-five years, in trust, for the sole use and benefit of the band or village to which it is issued, and that at the expiration of said period the United States will convey the same or remaining portion not previously patented in severalty by patent to said band or village, discharged of said trust, and free of all charge or incumbrance whatsoever: * * *

"Sec. 4. That whenever any of the Indians residing upon any reservation patented under the provisions of this act shall, in the opinion of the Secretary of the Interior, be so advanced in civilization as to be capable of owning and managing land in severalty, the Secretary of the Interior may cause allotments to be made to such Indians, out of the land of such reservation, in quantity as follows: * * *.

"Sec. 5. That upon the approval of the allotments provided for in the preceding section by the Secretary of the Interior he shall cause patents to issue therefor in the name of the allottees, which shall be of the legal effect and declare that the United States does and will hold the land thus allotted for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs, according to the laws of the State of California, and that at the expiration of said period the United States will convey the same by patent to the said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever * * *."

Amendment of Mission Indian Act.

The Mission Indian Act was amended by the Act of March 2, 1917 (39 Stat. 969, 976) as follows:

> "Provided, that *the Secretary of the Interior be, and he is hereby, authorized and directed to cause allotments to be made to the Indians belonging to and having tribal rights on the Mission Indian Reservations in the State of California,* in areas as provided in section seventeen of the Act of June twenty-fifth, nineteen hundred and ten (Thirty-sixth Statutes at Large, page eight hundred and fifty-nine), instead of as provided in section four of the Act of January twelfth, eighteen hundred and ninety-one (Twenty-sixth Statutes at Large page seven hundred and thirteen): Provided, that this act shall not affect any allotments heretofore patented to these Indians." (Italics ours.)

General Allotment Act.

The Act of February 8, 1887 (Ch. 119, Sec. 1, 24 Stat. 388) as amended by the Act of February 28, 1891 (Ch. 383, Sec. 1, 26 Stat. 794) and by the Act of June 25, 1910 (Ch. 431, Sec. 17, 36 Stat. 859) is codified in Title 25 U. S. C. A., Section 331, as follows:

> "In all cases where any tribe or band of Indians has been or shall be located upon any reservation created for their use by treaty stipulation, Act of Congress, or Executive order, the President shall be authorized to cause the same or any part thereof to be surveyed or resurveyed whenever in his opinion such reservation or any part may be advantageously utilized for agricultural or grazing purposes by such Indians, and to cause allotment to each Indian located thereon to be made in such areas as in his opinion may be for their best interest not to exceed eighty acres of agricultural or one hundred and sixty acres of grazing land to any one Indian. And whenever it shall appear to the President that lands on any Indian reservation subject to allotment by authority of law have been or may be

brought within any irrigation project, he may cause allotments of such irrigable lands to be made to the Indians entitled thereto in such areas as may be for their best interest not to exceed, however, forty acres to any one Indian, and such irrigable land shall be held to be equal in quantity to twice the number of acres of nonirrigable agricultural land and four times the number of acres of nonirrigable grazing land: *Provided,* That the remaining area to which any Indian may be entitled under existing law after he shall have received his proportion of irrigable land on the basis of equalization herein established may be allotted to him from nonirrigable agricultural or grazing lands: *Provided further,* That where a treaty or Act of Congress setting apart such reservation provides for allotments in severalty in quantity greater or less than that herein authorized, the President shall cause allotments on such reservations to be made in quantity as specified in such treaty or Act subject, however, to the basis of equalization between irrigable and nonirrigable lands established herein, but in such cases allotments may be made in quantity as specified herein with the consent of the Indians expressed in such manner as the President in his discretion may require."

Act of February 14, 1923

The Act of February 14, 1923, Ch. 76, 42 Stat. 1246 (Title 25 U. S. C. A., Section 335) extends the General Allotment Act to the Mission Indians, inter alia, as follows:

"That unless otherwise specifically provided, the provisions of the * * * (General Allotment Act), as amended, be and they are hereby, extended to all lands heretofore purchased or which may hereafter be purchased by authority of Congress for the use or benefit of any individual Indian or band or tribe of Indians."

IN THE

Supreme Court of the United States

October Term, 1943

No. 463.

LEE ARENAS, *Petitioner,*

vs.

THE UNITED STATES OF AMERICA, *Respondent.*

PETITIONER'S SUPPLEMENTAL BRIEF.

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I.

The decision of the Circuit Court of Appeals is reported in 137 F. (2d) 199.

II.

The jurisdiction of this Court is invoked under the order of this Court dated December 20, 1943, granting certiorari, under Section 240 of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. A., section 347(a)). Presumably, the writ was granted because the decision of the Court below was in conflict with applicable Acts of Congress and with the decisions of this Court and other Circuit Courts of Appeals.

III.

The principal question presented is whether the Secre-

patent to lands in severalty in the Agua Caliente or Palm Springs (California) reservation of the Mission Indians selected by and allotted to petitioner pursuant to the Mission Indian Act (Act of January 12, 1891, ch. 65, 26 Stat. 712) and other applicable Acts of Congress.

IV.

Statement of Facts.

Petitioner is a full blood Mission Indian and is a member of the Palm Springs band of Mission Indians of California. He was born and has at all times since lived upon the Palm Springs Indian Reservation and has at all times kept and maintained his tribal relationship, membership and enrollment in said Palm Springs Band of Mission Indians; and has likewise kept and maintained his home and residence separate and apart from any tribe of Indians on said Reservation, and throughout his whole life has adopted and followed the habits, ways and methods of civilized life [R. 2-4]. Petitioner is able to read and write the English language, possesses a degree of education and intelligence above the average of any race, and since February 8, 1887, has been entitled to all of the rights, privileges and immunities of a citizen of the United States and of the heritage of his Indian ancestry [R. 2-3].

On or about June 7, 1921, the Secretary of the Interior determined that the members of the Palm Springs Band of Mission Indians, including petitioner, were sufficiently advanced in civilization, and had so far adopted the habits and ways of civilized life as to be capable of owning and managing land in severalty [R. 3-4], and pursuant to such determination and to applicable Acts of

Congress the Secretary of the Interior appointed one H. E. Wadsworth as Special Allotting Agent of the United States to make, and cause to be made, allotments of land in severalty in the Palm Springs Indian Reservation to such of the duly and regularly enrolled members of said Band of Mission Indians, including petitioner, as made or might make selection of lands for allotment in severalty and to allot, or cause to be allotted, to them the lands selected by them, respectively, in severalty [R. 3-4]. Pursuant to such appointment, the said H. E. Wadsworth, as such Special Allotting Agent of the United States, made surveys of the lands of the various tribes or bands of the Mission Indians of California, including the Palm Springs Band. in order to make allotments in severalty to the members of the several tribes or bands of Mission Indians, including said Palm Springs Band.

On or about the ..... day of June, 1923, petitioner made his selection of lands for allotment in severalty to him as follows: Lot No. 46, Section 14; Tract No. 39, Section 26, and E½ SW¼ NW¼ and SE¼ NW¼ NW¼ and SW¼ NE¼ NW¼ of Section 26, all in Township 4 South, Range No. 4 East of the San Ber. M., containing 47 acres more or less according to Government Survey. Said selection included the homesite which petitioner then and for a long time prior thereto had occupied and partially improved as his homesite [R. 4-5].

On or about June 21, 1923, the said H. E. Wadsworth, as such Special Allotting Agent of the United States, issued to petitioner a certificate of selection for allotment of said lands [R. 4-9] and in evidence thereof inscribed said selection for allotment on the Official Special Allotment Schedules, and thereafter certified said selection

for allotment, and other such selections, and said Schedules to the Secretary of the Interior [R. 4-5].

The Certificate so issued to the petitioner is in the words and figures following:

"5-201

"SELECTION FOR ALLOTMENT

"On Agua Caliente Indian Reservation, 1923.

"This is to Certify That Lee Arenas has selected the Lot No. 46, Sec. 14, Tract No. 39, Sec. 26, and E½ SW¼ NW¼ & SE¼ NW¼ NW¼ & SW¼ NE¼ NW¼ of Sec. 26, all in Township 4 South, Range No. 4 East of the San Ber. M., containing 47 acres, more or less, according to Government Survey. Stake No. .....

"Not valid unless approved by the Secretary of the Interior.

(signed) H. E. WADSWORTH
U. S. Special Alloting Agent."

"6-1060." [R. 5-7.]

On or about October 26, 1923, the said H. E. Wadsworth, as such Special Allotting Agent of the United States, was notified by the Bureau of Indian Affairs of the Department of the Interior that the members of the Palm Springs Band of Mission Indians, including petitioner, might enter upon and take physical possession of the lands selected by them, respectively, for the planting and cultivation of crops [R. 10]. And thereafter the said Special Allotting Agent of the United States, in ac-

cordance with the custom of the Bureau of Indian Affairs, encouraged and permitted petitioner to make, and petitioner did make, permanent improvements upon the lands so selected by and allotted to him of the cash value of $15,000 [R. 12-15].

The Secretary of the Interior has failed to issue to and withholds from petitioner a trust patent in severalty to the lands selected by petitioner, and this suit is brought to secure a judicial determination of petitioner's right to such patent.

The District Court held that the issues raised by the complaint had been decided adversely in *St. Marie v. United States,* 108 F. (2d) 876 [R. 59-60], and the Circuit Court of Appeals affirmed the decision of the District Court (137 F. (2d) 199). This Court has granted certiorari.

V.

Assignments of Error.

The Court below (the Circuit Court of Appeals for the Ninth Circuit), erred in affirming the judgment of the District Court for the following reasons:

1. The decision of the Circuit Court of Appeals is contrary to the applicable Acts of Congress and to the decisions of this Court and other Circuit Courts of Appeals.

2. Under the facts pleaded in the complaint the United States of America is estopped to deny the power and the

duty of the Secretary of the Interior to issue a trust patent to petitioner to the lands selected for allotment by him.

3. The United States of America is estopped by reason of the laches of the Secretary of the Interior, in withholding formal approval of petitioner's selection for allotment, to deny petitioner's equitable right and title to the lands selected by him.

4. The law does not authorize the Secretary of the Interior to withhold a trust patent from a qualified allottee who has established an equitable right thereto.

5. The petitioner has done everything which the Acts of Congress and law require him to do to attain his right to a trust patent to the lands selected by him for allotment, and the neglect or failure of the Secretary of the Interior to issue such patent does not defeat petitioner's right thereto.

VI.

Summary of Argument.

Under the facts shown by the Complaint, petitioner has a vested right to a trust patent to the lands selected by and allotted to him, and the Secretary of the Interior is without authority to withhold such patent and is estopped to deny petitioner's equitable right and title in said lands.

VII.

ARGUMENT.

A. Petitioner Is Vested With an Equitable Right to a Trust Patent for Lands Selected by and Allotted to Him.

The decisions of the District Court and of the Circuit Court of Appeals in this case rest entirely upon the authority of *St. Marie v. United States*, 108 F. (2d) 876. It is, therefore, necessary to state briefly the substance of the decision in that case. It was there held that

> "before there could be a valid allotment the Secretary must: (1) determine that the Indians have reached a degree of civilization required by the (Mission Indian) Act; (2) make an order 'setting up the mechanics for selection'; and (3) make and approve actual allotments; that no allotment was made; and that if the certificates of selections could be considered as . . . certificates of allotment the same were not effective because there had been no determination that the Indians in question were sufficiently advanced so as to comply with the Act, and the approval of the Secretary was lacking. 24 F. Supp. 237-240." (*St. Marie v. United States*, 108 F. (2d) 876, at p. 879.)

This holding was given full application to the case at bar.

The answer to the foregoing statements and holdings in the *St. Marie* case may be summarized as follows: (1) The Congress, by the Act of March 2, 1917, determined that the Mission Indians of California were so advanced in civilization as to be capable of owning and managing

lands in severalty, and accordingly directed the Secretary of the Interior

> "to cause allotments to be made to the Indians belonging to and having tribal rights on the Mission Indian Reservations in the State of California,"

which determination and direction were recognized and followed by the Secretary of the Interior, who appointed a Special Allotting Agent for the Mission Indians of California and thereafter caused selections for allotments of lands in severalty to be made and certified for them. (2) "The mechanics for selection" had already been created by the General Allotment Act (Act of February 8, 1887, Ch. 119, *24 Stat. 388*) and were, therefore, by operation of law as well as in fact, embraced in the appointment and authorization of the Special Allotting Agent to cause selections for allotments to be made in conformity with the provisions of both the Mission Indian Act, as amended, and the General Allotment Act (Sections 2 and 3) as amended. (3) The approval of the selections for allotments which were later made is implicit in the acts and conduct of the Secretary of the Interior in (a) putting the allottees, including petitioner, in possession of the lands selected by and certified to them; (b) in the authorization by the Secretary to occupy, use and improve the same, and (c) in the failure of the Secretary for many years thereafter to question the equitable right and title of the allottees therein. And (4) the Secretary issued trust patents, under the same procedure, to approximately one thousand Mission In-

dians on other Mission Indian Reservations in California (*St. Marie v. United States,* 108 F. (2d) 876, p. 887), thereby conclusively showing that he was following the determination of civilization, made by Congress by the Act of March 2, 1917, and that he had set up and followed the mechanics for selection created by the General Allotment Act, and had made the allotments and issued the trust patents in conformity with these and other Acts of Congress. An examination of the several applicable Acts of Congress becomes advisable.

B. Petitioner's Vested Right to a Trust Patent Accrued Under the General Allotment Act. as Amended, and Other Applicable Acts of Congress.

(Pertinent Acts. or portions of Acts, of Congress appear in the Appendix to the Petition and supporting Brief.)

GENERAL ALLOTMENT ACT.

The General Allotment Act (Act of February 8, 1887. Ch. 119, *24 Stat. 388*)

> "was intended to be and was a general act relating to all Indian reservations, except those mentioned in section 8, 24 U. S. C. A., section 388." (*St. Marie v. United States,* 108 F. (2d) 876, 878.)

The reservations excepted in Section 8 of the Act do not include the Mission Indian reservations.

Section 1 of the General Allotment Act provides:

> "That in all cases where any tribe or band of Indians has been, or shall hereafter be, located upon

any reservation created for their use * * * the President of the United States be, and he hereby is, authorized * * * to cause said reservation or any part thereof, to be surveyed, or resurveyed, if necessary, and to allot lands in said reservation in severalty to any Indian located thereon * * *."

Section 2 of the Act provides:

"That all allotments set apart under the provisions of this Act shall be selected by the Indians, heads of families selecting for their minor children, and the agents shall select for each orphan child, and in such manner as to embrace the improvements of the Indians making the selection."

Section 3 of the Act provides:

"That the allotment provided for in this act shall be made by special agents appointed by the President for such purpose, and the agents in charge of the respective reservations on which the allotments are directed to be made, under such rules and regulations as the Secretary of the Interior may from time to time prescribe * * *."

Section 5 of the Act provides:

"That upon approval of the allotments provided for in this act by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of legal effect, and declare that the United States does and will hold the land thus allotted, for a period of twenty-five years, in trust * * *."

These provisions of the General Allotment Act became engrafted upon and a part of the Mission Indian Act upon its enactment in 1891 and therefore supplied "the me-

chanics for selection" of allotments under the latter Act. Furthermore, the Special Allotting Agent's certification of these allotments to the Secretary of the Interior shows

> "that the allotments shown hereon were made in accordance with the provisions of the Act of Congress of February 8, 1887 (24 Stat. L. 388), as amended by the Act of June 25, 1910 (36 Stat. L. 855), and supplemented by the Act of March 2, 1917 (39 Stat. L. 969-976)." (*St. Marie v. United States*, 108 F. (2d) 876, at page 879.)

One of these provisions, which thus became engrafted upon the Mission Indian Act, was

> "that all allotments * * * shall be selected by the Indians, heads of families selecting for their minor children * * *." (Sec. 2, Gen. Allot. Act.)

This right of selection by the Indians therefore existed at the time of the passage of the Mission Indian Act (Secs. 1 and 2) and became, and is, a part thereof.

MISSION INDIAN ACT.

The Mission Indian Act (Act of January 12, 1891, Ch. 65, *26 Stat. 712*) was passed by Congress "for the relief of the Mission Indians in the State of California" and "to arrange a just and satisfactory settlement of the Mission Indians * * * upon reservations which shall be secured to them" as provided therein. To accomplish these objects and purposes, the Act provided for the appointment of a Commission "to select a reservation for each band or village of the Mission Indians residing within said State * * * sufficient in extent to meet their just requirements * * *." (Secs. 1 and 2.) The Act further provided (Sec. 3) that, upon completion of

their work, the Commission "shall report the result to the Secretary of the Interior, who, if no valid objection exists, shall cause a patent to issue for each of the reservations selected by the Commission and approved by him in favor of each band or village" in trust for 25 years "and that at the expiration of said period the United States will convey the same or remaining portion not previously patented in severalty by patent to said band or village, discharged of said trust * * *." It is apparent that Sections 1, 2 and 3 of the Act are mandatory, and leave little, if anything, to the discretion of the Secretary of the Interior.

Section 4 of the Act provides

> "that whenever any of the Indians residing upon any reservation patented under the provisions of this act shall, in the opinion of the Secretary of the Interior, be so advanced in civilization as to be capable of owning and managing land in severalty, the Secretary * * * may cause allotments to be made to such Indians, out of the land of such reservation, in quantity as follows * * *."

Section 5 of the Act provides

> "that upon approval of the allotments provided for in the preceding section by the Secretary of the Interior he shall cause patents (in trust) to issue therefor in the name of the allottees"

for twenty-five years.

It thus appears that the Mission Indian Act made no express provision for the selection of land in severalty by the Mission Indians, nor did it provide any mechanics

for such selection and allotment. The Mission Indian Act was silent in these respects, because the right of selection, and the mechanics necessary to make selections and allotments in severalty, already existed under the General Allotment Act. It was wholly unnecessary for the Congress to incorporate the provisions of existing general law into the Mission Indian Act. This is true: first, because the General Allotment Act *in terms* was made applicable to "*any* tribe or band of Indians (that) has been, *or shall hereafter be*, located upon any reservation created for their use"; and, second, because the General Allotment Act and the Mission Indian Act are statutes *in pari materia* and should be construed together in order to determine and make effective the legislative intent with respect to the Mission Indians.

In this connection, it is said in 25 R. C. L. 1060, Section 285, that:

> "It is a fundamental rule of statutory construction that not only should the intention of the lawmaker be deduced from a view of the whole statute and of its every material part, but statutes in *pari materia* should be construed together."

See, also:

Richardson v. Harmon, 222 U. S. 96, 56 L. Ed. 110;

United States v. Ewing, 237 U. S. 197, 59 L. Ed. 913;

Bankers' Trust Co. v. Bowers, 295 Fed. 89;

Heiden v. Cremin, 66 F. (2d) 943, 91 A. L. R. 247 (Cert. den. 290 U. S. 687, 78 L. Ed. 592).

This rule applies not only to contemporaneous statutes, but also to earlier statutes in *pari materia*. See 25 R. C. L., p. 1063, Section 287, where it is said that

> "Statutes *in pari materia* to which reference may be made in aid of construction are not only contemporaneous statutes, but also earlier statutes *in pari materia*. The legislature is presumed to have been acquainted with their judicial construction, and to have passed new statutes on the same subject with reference thereto."

The rule finds ample support in *Panama R. Co. v. Johnson*, 264 U. S. 375, 68 L. Ed. 748; *United States v. Jefferson Elec. Co.*, 291 U. S. 386, 78 L. Ed. 859, and *United States v. Arizona*, 295 U. S. 174, 79 L. Ed. 1371.

The Mission Indian Act discloses the legislative intent to be, that reservations be created for the Mission Indians and that, as soon as any of these Indians should be capable of owning and managing lands in severalty, patents in trust be issued to them. This legislative intent can be made completely effective by applying the provisions of the General Allotment Act, and this should be done because

> "it is a rule of statutory construction that legislative enactments in general and comprehensive terms, prospective in operation, apply alike to all persons, subjects and business within their general purview and scope coming into existence subsequent to their passage." (25 R. C. L. 778, sec. 24.)

Schus v. Powers-Simpson Co., 85 Minn. 447, 89 N. W. 68;

Palmer v. State, 197 Ind. 625, 150 N. E. 917;

Commonwealth v. Maxwell, 271 Pa. St. 378, 114 Atl. 825, 16 A. L. R. 1134;

State ex rel Anderson v. Fousek, 91 Mont. 448, 8 P. (2d) 791, 84 A. L. R. 303;

Haselton v. Interstate Stage Lines, 82 N. H. 327, 133 Atl. 451, 47 A. L. R. 218;

Re Fox Film Corporation, 295 Pa. 461, 145 Atl. 514, 64 A. L. R. 499.

THE ACT OF JUNE 25, 1910.

Section 17 of the Act of June 25, 1910, amended the Act of February 28, 1891, which latter Act amended the General Allotment Act. Said Section 17 provided:

"That in all cases where any tribe or band of Indians has been or shall hereafter be located upon any reservations created for their use by treaty, stipulation, Act of Congress, or executive order, the President shall be authorized to cause the same or any part thereof to be surveyed or resurveyed whenever in his opinion such reservation or any part thereof may be advantageously utilized for agricultural or grazing purposes by such Indians, and to cause allotment to each Indian located therein to be made in such areas as in his opinion may be for their best interest not to exceed eighty acres of agricultural or one hundred and sixty acres of grazing land to any one Indian. And whenever it shall appear to the President that lands on any Indian reservations subject to allotment by authority of law have been or may be brought within any irrigation project, he may cause allotments of such irrigable lands to be made to the Indians entitled thereto in such areas as may be for their best interest not to exceed, however, forty acres to any one Indian, and such irrigable land shall be held to be equal in quantity to twice

the number of acres of non-irrigable agricultural land and four times the number of acres of non-irrigable grazing land. * * *."

The similarity between the language of section 17 of the Act of June 25, 1910, and section 1 of the General Allotment Act. is apparent, and conforms to the general pattern of Congressional legislation for Indians.

The Act of June 25, 1910, has an important bearing on the rights of the Mission Indians of California, in that it provides for and regulates allotments of irrigable lands, for which no provision was made in any of the Mission Indian Acts. It is also important because it is an amendment to the General Allotment Act which by the Act of March 2, 1917 (39 Stat. 969-976), by name and designation, is made applicable to the Mission Indian reservations in California.

THE ACT OF MARCH 2, 1917.

It is provided in the Act of March 2, 1917, which is amendatory of the Mission Indian Act:

"That section three of the Act of January twelfth, eighteen hundred and ninety-one (Twenty-sixth Statutes at Large, page seven hundred and twelve) entitled 'An Act for the relief of Mission Indians in California,' be, and the same is hereby amended so as to authorize the President, in his discretion and whenever he shall deem it for the best interests of the Indians affected thereby, to extend the trust period for such time as may be advisable on the lands held in trust for the use and benefit of the Mission Bands or villages of Indians in California: Provided, that *the Secretary of the Interior be and he is here-*

by, authorized and directed to cause allotments to be made to the Indians belonging to and having tribal rights on the Mission Indian Reservations in the State of California, in areas as provided in section seventeen of the Act of June twenty-fifth, nineteen hundred and ten (Thirty-sixth Statutes at Large, page eight hundred and fifty-nine), instead of as provided in section four of the Act of January twelfth, eighteen hundred and ninety-one (Twenty-sixth Statutes at Large, page seven hundred and thirteen): Provided, that this act shall not affect any allotments heretofore patented to these Indians." (Italics ours.)

It is significant that when the Act of March 2, 1917 was enacted more than twenty-five years had elapsed since the enactment of the Mission Indian Act. Thus the Congressional intent was to be effectuated.

It is obvious that the Act of March 2, 1917, was designed not only to provide for the allotment of irrigable lands for which no provision had previously been made, but to make mandatory, instead of discretionary, the allotment of these and other lands in severalty to the Mission Indians in California. It is also obvious that the Secretary of the Interior so construed this Act, for soon thereafter he appointed a Special Allotting Agent, and other proceedings were had to carry out the legislative mandate expressed in the Act. Moreover, the same construction of the Act appears in a communication from the Attorney General of the United States, signed by the Assistant Attorney General to the Secretary of the Interior, wherein it was said:

"As to the allotment feature of the situation, we are confronted with the provision in the Act of March 2, 1917 (39 Stat. 976), amending section 3

> of the Act of January 12, 1891 (26 Stat. 712), *so as to direct* the Secretary of the Interior to make allotments to the Indians of the Mission Reservations in California in areas as provided in section 17 of the Act of June 25, 1910 (36 Stat. 859), rather than as provided in section 4 of the Act of January 12, 1891, *supra;* in other words, *usually regarded as mandatory rather than discretionary legislation.*" (*St. Marie v. United States,* 108 F. (2d) 890.) (Italics ours.)

It is apparent that the Act of March 2, 1917, not only amended but superseded sections 3 and 4 of the Mission Indian Act in the respects mentioned. Moreover, the Act of March 2, 1917, being mandatory, constituted a determination by the Congress that the Mission Indians in California had so advanced in civilization as to be capable of owning and managing lands in severalty.

THE ACT OF FEBRUARY 14, 1923.

It was provided in the Act of February 14, 1923 (Ch. 76, 42 Stat. 1246),

> "That unless otherwise specifically provided, the provisions of the Act of February 8, 1887 (Twenty-fourth Statutes at large, page 388), as amended, be, and they are hereby, extended to all lands heretofore purchased or which may hereafter be purchased by authority of Congress for the use or benefit of any individual Indian or band or tribe of Indians."

This Act made lands purchased for the Indians on all reservations subject to the General Allotment Act, and a plain implication arises that public lands of the United

States, withdrawn and set apart for the use of these Indians, are by existing statutes made subject to the provisions of that Act.

With the passage of the Act of February 14, 1923, a comprehensive legislative scheme for making allotments in severalty to all Indians, including the Mission Indians in California, was completed by the Congress, covering all classes of land set apart for the use of any tribe or band of Indians.

The five Acts of Congress hereinbefore mentioned and discussed constitute a complete and fully integrated legislative plan for the allotment of lands in severalty to the Mission Indians in California. Each of these five Acts is entirely consistent with the others. There is no repugnancy between them. These statutes are *in pari materia* and must be construed as one system and must be governed by one spirit and policy in order to carry out the legislative intent. (See *Moore v. C. & O. Ry. Co.*, 291 U. S. 205, 214, 78 L. Ed. 755; *Kernin v. City of Coquille*, 143 Or. 127, 21 P. (2d) 1078, 1080; *Tragessor v. Cooper*, 313 Pa. 10, 169 Atl. 376, 377; and other cases, *supra.*) Thus considered and given effect, the intent and plan of the Congress will not be thwarted.

These statements and conclusions are in harmony with well recognized rules of statutory construction. One of these is that in the "construction of statutes we are to look to the state of the law when the statute was enacted in order to see for what it was intended as a substitute."

(25 R. C. L. 1052, sec. 277.) Moreover, "no single statute should be interpreted solely by its own words" for "upon enactment it becomes a part of, and is to be read in connection with, the whole body of the law. Its interpretation is to be in the light of the general policy of *previous* legislation" * * * and "should receive such construction as will not conflict with general principles and will make it harmonize with the pre-existing body of law." (*Idem.*)

See, also:

Farrington v. Commissioner of Internal Revenue, 30 F .(2d) 915, 67 A. L. R. 535 (Cert. den. 279 U. S. 873, 73 L. Ed. 1008);

General Motors Acceptance Corp. v. Crumpton, 220 Ala. 297, 124 So. 870, 65 A. L. R. 1313;

Bookhart v. Greenlease-Lied Motor Co., 215 Iowa 8, 244 N. W. 721;

Kneeland v. Emerton, 280 Mass. 371, 183 N. E. 155, 87 A. L. R. 1;

Com. v. Flynn, 285 Mass. 136, 188 N. E. 627, 92 A. L. R. 206.

C. Petitioner Is Entitled to a Trust Patent to the Lands Selected by and Certified for Allotment to Him.

It is clear that, in such circumstances as appear in the record of this case, the selection of an allotment is the inception of an equitable title, and the right thereto may not be defeated by the arbitrary action of the Secretary of the Interior in withholding a trust patent to the lands selected,

See:

Ladiga v. Roland, et al., 2 How. 581, 43 U. S. 581, 11 L. Ed. 387;

Hy-Yu-Tse-Mil-Kin v. Smith, 194 U. S. 401, 414, 48 L. Ed. 1039; *Ballinger v. United States ex rel Frost*, 216 U. S. 240, 249, 54 L. Ed. 464;

Fairbanks v. United States, 223 U. S. 215, 56 L. Ed. 409;

Henry Gas Co. v. United States, 191 Fed. 136;

Thomason v. Wellman & Rhoades, 206 Fed. 895, 897;

United States v. Dowden, 220 Fed. 277;

United States v. Whitmire, 236 Fed. 474.

The fact that no patent is issued is immaterial.

"When the right to a patent has once become vested under the law, it is equivalent, so far as the government is concerned, to a patent actually issued. *Simmons v. Wagner*, 101 U. S. 260, 25 L. Ed. 910; *Deffeback v. Hawke*, 115 U. S. 392, 6 Sup. St. 95, 29 L. Ed. 423; *Hedrick v. Railroad Co.*, 167 U. S. 673, 17 Sup. Ct. 922, 42 L. Ed. 320; *Wallace v. Adams*, 143 Fed. 716, 74 C. C. A. 540, affirmed *id.*, 204 U. S. 415, 27 Sup. Ct. 363, 51 L. Ed. 547. *An allotment certificate has the same effect as the action of the Land Department in the disposition of the public lands within its control. Wallace v. Adams, supra; United States v. Dowden, supra.*" (*United States v. Whitmire*, 236 Fed. 474, 480.) (Italics ours.)

When a selection for allotment has been made and the right of allotment has attached, delay in issuing, or failure to issue the patent does not postpone or defeat the

vesting of the equitable interest in the allottee. The right, in that case, depends upon what ought to have been done. A selection made at a time when the right exists to do so creates an interest or right so vested that it descends to the heirs and fixes the right of property.

See:

Smith v. Boniface, 132 Fed. 889, 891;

St. Marie v. United States, 876, 895 (dissenting op.);

Lytle, et al. v. Arkansas, 9 Howard 314, 13 L. Ed. 153;

Barney v. Dolph, 97 U. S. 652, 24 L. Ed. 1063;

Cornelius v. Kessel, 128 U. S. 469, 32 L. Ed. 482;

Ballinger v. United States ex rel Frost, 216 U. S. 240, 54 L. Ed. 464;

United States v. Payne, 284 Fed. 827;

Payne v. Mexico, 255 U. S. 367, 65 L .Ed. 680.

The Department of the Interior, as late as July 31, 1929, some years after petitioner's right to a patent had accrued, held in *Raymond Bear Hill*, 52 L. D. 68, that the right of a qualified Indian to an allotment is analogous to that of an entryman to public lands, saying:

> "* * * it may be said generally that it is well settled that a claimant to public land who has done all that is required under the law to perfect his claim, acquires a right against the Government and that his right to a legal title is to be determined as of that time. This rule is based on the theory that by virtue of his compliance with the requirements, he has an equitable title to the land; that in equity it is his and the Government holds it in trust for him,

although no legal title passes until patent issues. *Wyoming v. United States* (255 U. S. 489 (41 S. Ct. 393, 65 L. Ed. 742)); *Payne v. New Mexico* (255 U. S. 367 (41 S. Ct. 333, 65 L. Ed. 680)); *Payne v. Central Pacific Railway Company* (255 U. S. 228 (41 S. Ct. 314, 65 L. Ed. 598)). It would seem to follow that what is true concerning the equitable rights of an entryman to public land is also true as to the equitable rights of a qualified Indian to an allotment of tribal or reservation land. In fact, the position of a qualified Indian is stronger than that of an entryman of public land, for the reason that he has an inherent interest in the common property of his tribe."

* * * * * * * *

"The rule applicable in this matter is the same as that applying to any qualified person who performs all conditions prescribed by law to secure entry of lands open thereto—the law considers that as done and virtually views the entry made. *Hy-Tu-Tse-Mil-Kin v. Smith* (194 U. S. 401 (24 S. Ct. 676, 48 L. Ed. 1039))."

Even if the Act of March 2, 1917, had not deprived the Secretary of the Interior of the discretion granted to him by section 4 of the Mission Indian Act, petitioner's right to a patent under the facts disclosed here would exist. See, *Supervisors of Rock Island County v. United States ex rel. State Bank*, 4 Wall. 435, 71 U. S. 435, 18 L. Ed. 419 where the question was, whether the Supervisors were compelled to levy and collect, by taxation, an amount specified by the Court below. The act involved provided that where "current revenue * * * is not sufficient to pay (the Supervisors) *may*, if deemed advisable, levy a special tax * * *." (Italics ours.) As

to the construction to be placed upon this language the Court said, page 446, 18 L. Ed. 419:

> "The conclusion to be deduced from the authorities is, that where power is given to public officers, in the language of the act before us, or in equivalent language—whenever the public interest or individual rights call for its exercise—the language used, though permissive in form, is in fact peremptory. What they are empowered to do for a third person the law requires shall be done. The power is given, not for their benefit, but for his."

Moreover ,as shown in the Petition and supporting brief, pages 11-14, the United States is estopped to question petitioner's equitable right and title to the lands selected for allotment by him.

Under the authorities cited herein and in the Petition and supporting brief, petitioner is entitled to a trust patent to the lands selected by and alloted to him. If the Secretary of the Interior can, upon his own capricious judgment, decide that lands authorized to be allotted by Congress ought not to be allotted, or if he can refuse without lawful cause to approve allotments made in conformity with law when submitted for action, then he can, in effect, nullify the law by withholding lands from allotment which the Congress has authorized and directed to be apportioned among the Indians entitled thereto. That he cannot lawfully withhold a trust patent from any Indian entitled thereto is clearly shown by the Act of February 6, 1901, Ch. 217, 31 Stat. 760, 25 U. S. C. A., section 345, which was enacted to correct such an abuse of power.

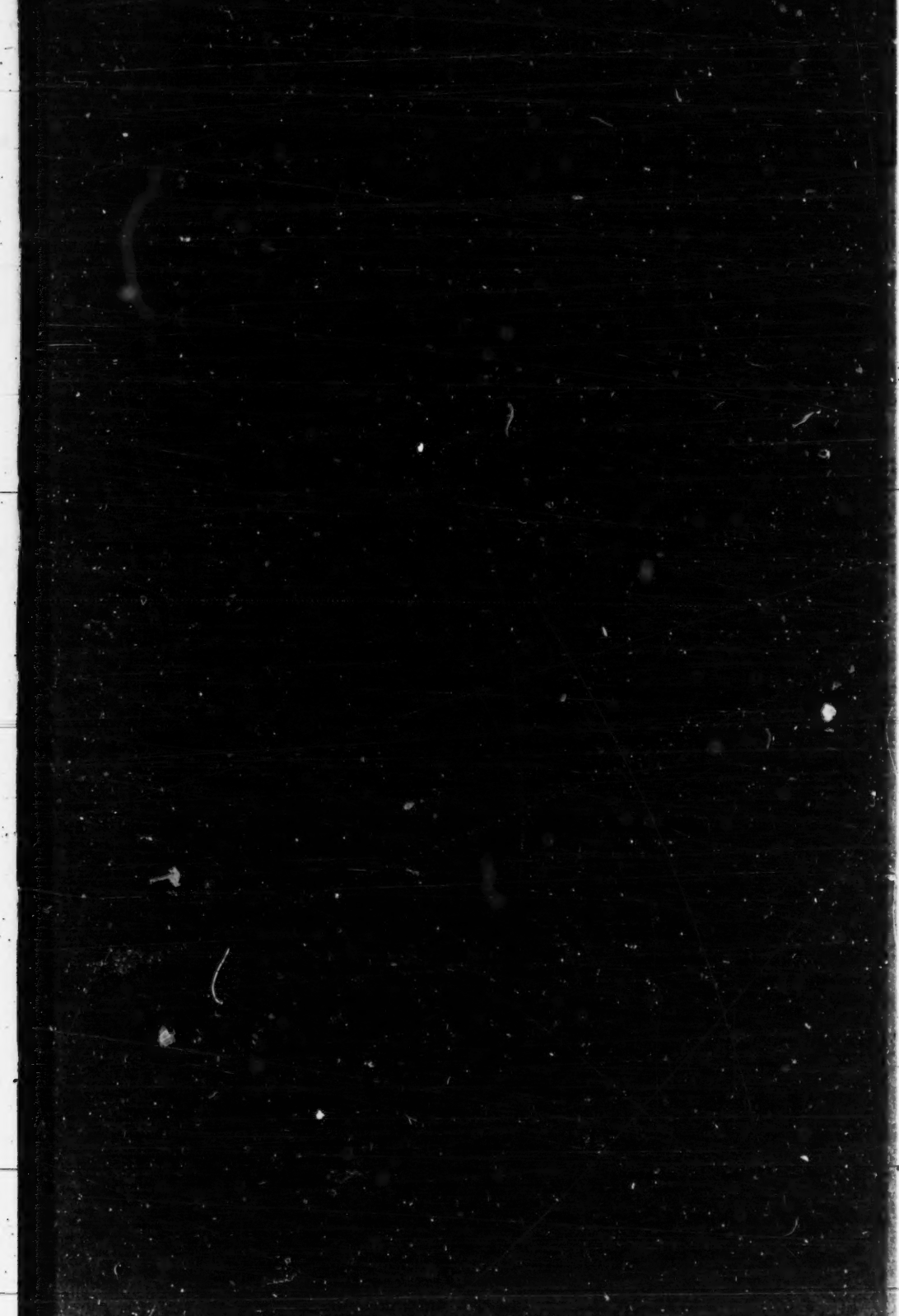
Conclusion.

The decision below is erroneous. It is therefore respectfully submitted that the judgment of the Court below should be reversed and this cause be remanded for further proceedings in conformity with the opinion of this Court.

Respectfully submitted,

JOHN W. PRESTON,
Counsel for Petitioner.

March ....., 1944.



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563433—43

In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 463

LEE ARENAS, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The district court wrote no opinion. The opinion of the circuit court of appeals (R. 74–75) is reported in 137 F. 2d 199.

JURISDICTION

The judgment of the circuit court of appeals sought to be reviewed was entered June 30, 1943 (R. 76–77). Petition for rehearing was denied August 4, 1943 (R. 77). The petition for a writ of certiorari was filed October 29, 1943. The jurisdiction of this Court is invoked under section

240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether, under the applicable legislation, a selection for allotment made on the Mission Indian reservation at Agua Caliente or Palm Springs, California, created an equitable right to receive a trust patent for an allotment of land on that reservation, when the selection was never approved by the Secretary of the Interior.

STATUTES INVOLVED

The pertinent parts of the Act of January 12, 1891, 26 Stat. 712, are as follows:

> SEC. 4. That whenever any of the Indians residing upon any reservation patented under the provisions of this act shall, in the opinion of the Secretary of the Interior, be so advanced in civilization as to be capable of owning and managing land in severalty, the Secretary of the Interior may cause allotments to be made to such Indians, out of the land of such reservation, in quantity as follows: To each head of a family not more than six hundred and forty acres nor less than one hundred and sixty acres of pasture or grazing land, and in addition thereto not exceeding twenty acres, as he shall deem for the best interest of the allottee, of arable land in some suitable locality; to each single person over twenty-one years of age not less

than eighty nor more than six hundred and forty acres of pasture or grazing land and not exceeding ten acres of such arable land.

SEC. 5. That upon the approval of the allotments provided for in the preceding section by the Secretary of the Interior he shall cause patents to issue therefor in the name of the allottees, which shall be of the legal effect and declare that the United States does and will hold the land thus allotted for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or in case of his decease, of his heirs according to the laws of the State of California, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever. * * *

The pertinent part of the Act of March 2, 1917, 39 Stat. 969, 976, is as follows:

* * * *Provided,* That the Secretary of the Interior be, and he is hereby, authorized and directed to cause allotments to be made to the Indians belonging to and having tribal rights on the Mission Indian reservations in the State of California, in areas as provided in section seventeen of the Act of June twenty-fifth, nineteen hundred and ten (Thirty-sixth Statutes at

Large, page eight hundred and fifty-nine),[1] instead of as provided in section four of the Act of January twelfth, eighteen hundred and ninety-one (Twenty-sixth Statutes at Large, page seven hundred and thirteen) * * *.

STATEMENT

On October 27, 1941, petitioner filed a second amended complaint in which he alleged that on or about June 7, 1921, the Secretary of the Interior determined that the Agua Caliente or Palm Springs Band of Mission Indians of California, of which petitioner was a member, were so far advanced in civilization and had so far adopted the life, habit, and ways of civilized life as to be capable of owning and managing land in severalty, and had appointed a Special Allotting Agent to make allotments of land on that reservation to the members of that band of Indians; that on or about June 23, 1923, petitioner made his allotment selections and received from the Special Allotting Agent a certificate of selection for allotment, which was stamped "Not valid unless approved by the Secretary of the Interior"; that on or about October 26, 1923,

[1] Section 17 of the 1910 Act modified the Act of February 28, 1891, 26 Stat. 794, amending the General Allotment Act of February 8, 1887, 24 Stat. 388, to authorize the Secretary of the Interior to make allotments to certain Indians "in such areas as in his opinion may be for their best interest not to exceed eighty acres of agricultural or one hundred and sixty acres of grazing land to any one Indian."

the Special Alloting Agent, after inquiry of officials of the Indian Office at Washington, D. C., advised petitioner that he might take possession of the lands selected and make improvements thereon and encouraged him in this; that the Special Allotting Agent advised petitioner that the certificate of selection for allotment would be evidence of his vested right to hold, possess, and improve the lands pending issuance of a trust patent; that the Commissioner of Indian Affairs and the Secretary of the Interior represented to petitioner that a trust patent would issue; that in reliance upon these acts and representations on the part of the Special Allotting Agent, the Commissioner of Indian Affairs, and the Secretary of the Interior petitioner entered upon, cultivated, and substantially improved the lands; and that by reason of such acts and representations the United States was estopped to deny or question petitioner's right, title, or interest in the lands (R. 2–17). Petitioner prayed for a judgment holding him to be entitled to a trust patent for the lands selected and directing that a copy of the judgment be certified to the Secretary of the Interior (R. 47–48).[2]

[2] The prayer sought the relief authorized in proper cases by the Jurisdictional Act of August 15, 1894, 28 Stat. 286, 305, 25 U. S. C., sec. 345, as amended, which states that upon a determination that an Indian is entitled to an allotment of land, "the judgment or decree * * * shall have the same effect, when properly certified to the Secretary of the In-

On November 29, 1941, respondent filed a motion for summary judgment (R. 48–50). Attached to the motion was an affidavit by Carl Spinner, Principal Clerk of the Mission Indian Agency, in which it was stated that examination of the records of that Indian Agency showed that the Secretary had never approved any selections for allotment on the Agua Caliente or Palm Springs Indian reservation but had disapproved them (R. 50–51). Also attached to the motion was a certificate by E. J. Armstrong, Acting Commissioner of Indian Affairs, in which it was certified that no selections for allotment on that reservation had ever been approved by the Secretary of the Interior (R. 52). In support of the motion, respondent alleged that the subject matter and purpose of the second amended complaint were the same as those of the complaint in the case of *St. Marie* v. *United States,* 108 F. 2d 876, which the court had previously decided in favor of the respondent,[3] and that the only new matter

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terior, as if such allotment had been allowed and approved by him * * *."

[3] In the *St. Marie* case it appeared that a schedule of allotment selections showing selections for fifty members of the Agua Caliente or Palm Springs Band of Indians, to whom certificates had been issued, had been prepared in 1923, but that, because many of the selections shown thereon were not voluntary, a new schedule listing allotment selections voluntarily made by twenty-four members, to whom certificates were issued, was prepared in 1927. Eighteen actions for trust patents were filed with respect to selections appearing on these schedules. The district court held that the Indians

in the second amended complaint concerned an alleged estoppel, which raised no justiciable issues because the United States is not bound by the unauthorized statements and acts of its officers and agents (R. 53–54).

On January 26, 1942, judgment granting the motion was entered (R. 59–60). On June 30, 1943, the judgment was affirmed by the circuit court of appeals (R. 76–77).

ARGUMENT

1. Petitioner's basic contention is that, the Secretary of the Interior having determined petitioner to be so advanced in civilization as to be capable of owning and managing an allotment and having permitted petitioner to make a selection for allotment, petitioner is vested with an equitable right to an allotment and trust patent therefor, which cannot be withheld (Pet. 14–18). He supports this contention by reference to cases construing the General Allotment Act and other allotment acts, which hold that an allotment selection thereunder initiates a vested right which

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were not entitled to trust patents because the Secretary of the Interior had not determined that the several Indians were so far advanced in civilization as to be capable of owning and managing an allotment and had not approved their selections for allotment. 24 F. Supp. 237. The circuit court of appeals affirmed. 108 F. 2d 876. Certiorari was applied for and was denied on October 14, 1940, because the petition was filed out of time. 311 U. S. 652. Petitioner was not a party to any of these actions.

cannot be defeated by arbitrary action on the part of administrative officials. However, under the applicable Mission Indian legislation a determination as to petitioner's degree of civilization and the making of a selection for allotment, without more, do not create any vested right. Sections 4 and 5 of the Act of January 12, 1891, 26 Stat. 712, show that, as the court below held (R. 74) and as petitioner concedes (Pet. 8–9), approval by the Secretary of the Interior of the selection for allotment is also required. Petitioner further contends (Pet. 8–11) that the Act of March 2, 1917, 39 Stat. 969, 979, is a mandatory requirement that allotments shall be made and, in effect, eliminates the requirement of approval by the Secretary of the Interior. That Act, however, only changed the acreage that the Secretary of the Interior might allot. Moreover, even if it required the making of allotments, it would be necessary for petitioner to bring an appropriate action to compel the Secretary of the Interior to make allotments, which he has not yet made. *St. Marie* v. *United States*, 108 F. 2d 876, 881.

2. Petitioner also contends (Pet. 11–14) that acts and representations on the part of the Special Allotting Agent, the Commissioner of Indian Affairs, and the Secretary of the Interior estop the respondent from denying that petitioner has any vested right or that he is entitled to a trust patent. Plainly, however, any acts or representa-

tions on their part not consistent with the official action of the Secretary of the Interior in not approving petitioner's selection for allotment would be unauthorized and hence would not bind the United States. *Utah Power & Light Co.* v. *United States,* 243 U. S. 389, 409.

CONCLUSION

The decision below is correct and involves no conflict of decisions. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FAHY,
Solicitor General.
NORMAN M. LITTELL,
Assistant Attorney General.
NORMAN MACDONALD,
Attorney.

DECEMBER 1943.

U. S. GOVERNMENT PRINTING OFFICE 1943

[redacted]

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In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 463

LEE ARENAS, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The district court wrote no opinion. The reasons for the district court's action appear in the judgment (R. 59–60). The opinion of the circuit court of appeals (R. 74–75) is reported in 137 F. (2d) 199.

JURISDICTION

The judgment of the circuit court of appeals was entered June 30, 1943 (R. 76–77). Petition for rehearing was denied August 4, 1943 (R. 77). The petition for a writ of certiorari was filed October 29, 1943, and was granted December 20, 1943 (R. 78). The jurisdiction of this Court rests on section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether, under the applicable legislation, the pleadings, and the facts of the case, the district court properly granted the Government's motion for summary judgment on the grounds: (1) that petitioner has no right to allotments in severalty on the Mission Indian Reservation at Agua Caliente or Palm Springs, California, on the basis of selections for allotment thereon which have never been approved by the Secretary of the Interior and (2) that the United States is not estopped to deny that he has such right.

STATUTES INVOLVED

The Act of January 12, 1891, 26 Stat. 712, and section 3 of the Act of March 2, 1917, 39 Stat. 969, 976, relating to the Mission Indian reservations, are summarized at pp. 3–5 of the Statement and appear at pp. 52–58 and p. 58, respectively, of the Appendix.

STATEMENT

Petitioner brought this action under the provisions of the Act of August 15, 1894, 28 Stat. 286, 305, as amended, 25 U. S. C. sec. 345, to determine whether he is entitled to allotments in severalty and trust patents therefor on the Mission Indian Reservation at Agua Caliente or Palm Springs, California. The material facts of the case are as follows:

The Act of January 12, 1891, 26 Stat. 712, provided for the appointment of commissioners to arrange a just and satisfactory settlement of the Mission Indians of California on reservations (sec. 1), the selection and definition by the commissioners of a suitable reservation for each band or village of such Indians (sec. 2), and the issuance for each such reservation of a patent declaring that the United States "does and will hold the land thus patented, subject to the provisions of section four of this act, for the period of twenty-five years, in trust, for the sole use and benefit of the band or village to which it is issued, and that at the expiration of said period the United States will convey the same or the remaining portion not previously patented in severalty by patent to said band or village, discharged of said trust, and free of all charge or incumbrance whatsoever" (sec. 3).[1] Section 4 of the Act provided that "whenever any of the Indians residing upon any reservation patented under the provisions of this act shall, in the opinion of the Secretary of the Interior, be so advanced in civilization as to be capable of owning and managing land in severalty, the Secretary of the Interior may cause allotments to be made to such Indians, out of the land of such reservation" in specified

[1] Thirty such reservations were set apart and patented in trust pursuant to this legislation. Hearings, S. Comm., Indian Affairs, S. 1424 and 2589, 75th Cong., 1st sess., pp. 141–142.

quantities.[2] Section 5 provided that "upon approval of the allotments provided for in the preceding section by the Secretary of the Interior he shall cause patents to issue therefor in the name of the allottees, which shall be of the legal effect and declare that the United States does and will hold the land thus allotted for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs according to the laws of the State of California, and that at the expiration of said period the United States will convey the same by patent to the said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or encumbrance whatsoever."[3]

Section 3 of the Act of March 2, 1917, 39 Stat. 969, 976, amended section 4 of the Act of 1891, *supra*, to authorize and direct the Secretary of the Interior to cause allotments to be made to Indians

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[2] Each head of a family was to receive not more than six hundred and forty acres nor less than one hundred and sixty acres of pasture and grazing lands, and in addition thereto not exceeding twenty acres, as the Secretary of the Interior should deem advisable, of arable land in some suitable locality; and each single person over twenty-one years of age not less than eighty nor more than six hundred and forty acres of pasture or grazing land and not exceeding ten acres of arable land.

[3] Pursuant to this legislation, a number of allotments in severalty were made on each of three of the Mission Indian reservations, but none was made on the reservation at Agua Caliente or Palm Springs. Hearings, S. Comm., Indian Affairs, S. 1424 and 2589, 75th Cong., 1st sess., p. 142.

on the Mission Indian reservations in areas as provided in section 17 of the Act of June 25, 1910, 36 Stat. 859, instead of as provided in section 4 of the Act of 1891.[4]

On or about June 7, 1921, the Secretary of the Interior appointed one Harry E. Wadsworth as Special Allotting Agent at Large for the Mission Indian reservations of California, and instructed him to prepare schedules of selections for allotments thereon (R. 3–4). In 1923, the Department of the Interior received from Wadsworth a schedule showing selections for allotments for fifty members of the Agua Caliente or Palm Springs Band of Indians on their reservation. The Secretary of the Interior disapproved this schedule because it was found that many of the Indians did not want allotments and had not voluntarily made the selections listed in their names. He then instructed Wadsworth to prepare a new schedule listing only selections volun-

[4] Section 17 of the 1910 Act modified the Act of February 28, 1891, 26 Stat. 794, amending the General Allotment Act of February 8, 1887, 24 Stat. 388, to authorize the Secretary of the Interior to make allotments to certain Indians "in such areas as in his opinion may be for their best interest not to exceed eighty acres of agricultural or one hundred and sixty acres of grazing land to any one Indian."

Subsequent to the Act of March 2, 1917, *supra*, allotments in severalty were made and individual trust patents issued therefor to 733 Mission Indians on eight of the Mission reservations other than the one at Agua Caliente or Palm Springs. Hearings, S. Comm., Indian Affairs, S. 1424 and 2589, 75th Cong., 1st sess., pp. 142–143.

tarily made. Hearings, S. Comm., Indian Affairs, S. 1424 and 2589, 75th Cong., 1st sess., pp. 143, 154, 162.

In 1927, the Department received from Wadsworth a new schedule showing voluntary selections for twenty-four members of the Palm Springs Band of Indians. Generally, each selection included a two-acre town lot, five acres of irrigable land, and forty acres of desert land. The town lots chosen were all in Section 14, Township 4, South, Range 4, East, which section is immediately east of the business area of the city of Palm Springs.[5] Each Indian for whom a selection was listed received from Wadsworth a certificate of selection for allotment, which was stamped, "Not valid unless approved by the Secretary of the Interior."[6] Appended to the schedule was the following:

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[5] The Indian lands within the Agua Caliente or Palm Springs Reservation, with the exception of some lands which were purchased for them, comprise only the even-numbered sections, the odd-numbered sections having passed under a railroad grant or been otherwise disposed of. The city of Palm Springs extends over some of the odd-numbered sections of the reservation.

[6] Petitioner's certificate, which is typical, is as follows (R. 9):

"5–201

"SELECTION FOR ALLOTMENT

"On Agua Caliente Indian Reservation, 1923.

"This is to Certify That Lee Arenas has selected the Lot No. 46, Sec. 14, Tract No. 39, Sec. 26, and E. ½ SW. ¼ NW. ¼ & SE ¼ NW. ¼ NW. ¼ & SW.¼ NE. ¼ NW ¼ of Sec. 26, all in Township 4 South, Range No. 4 East of the

PALM SPRINGS, CALIF., *May 9, 1927.*

This is to certify that listing of allotment selections for the Indians of the Palm Springs (Agua Caliente) Indian Reservation, Calif., began on June 1, 1923, and the same was completed on May 9, 1927; and that it is further certified that the allotments shown hereon were made in accordance with the provisions of the act of Congress of February 8, 1887 (24 Stat. L. 388), as amended by the act of June 25, 1910 (36 Stat. L. 855). and supplemented by the Act of Mar. 2, 1917 (39 Stat. L. 969–76).

H. E. WADSWORTH,
Special Allotting Agent,
District Superintendent in Charge,
Mission Indian Agency, Calif.

In August of 1929 the 1927 schedule was submitted to the Department through the General Land Office with the recommendation that it be approved except as to five forty-acre tracts, which were adjacent to the city of Palm Springs and disproportionate in value to the other lands open to allotment.[7] Thereafter, the Indians in whose

San Ber. M., containing 47 acres, more or less, according to Government Survey. Stake No. ———.

"Not valid unless approved by the Secretary of the Interior.

"6–1060.

"(Signed) H. E. WADSWORTH,
"*U. S. Special Allotting Agent.*"

[7] These five tracts did not include any of the forty-acre tracts among the selections for allotment here involved.

names these tracts were listed were requested to make other selections more nearly comparable in value to the other lands available for selection, but they refused to do so. Administrative action on these selections was then suspended. Meanwhile, opposition to the making of allotments in severalty developed among the members of the Palm Springs Band of Indians, and as a result administrative action on the 1927 schedule was further delayed. During this period the conclusion was reached in the Department that in fairness to the Band as a whole and from the standpoint of their best interests, the lands scheduled for allotment should be held in a tribal status and dealt with as a tribal asset. This conclusion was founded upon the existence of opposition among the Band to the program of allotment; the fact that the reservation was unsuited to agricultural use because of a lack of water for irrigation purposes; and the great value of the lands in proximity to the city of Palm Springs, which had developed into a famous winter resort. Hearings, S. Comm., Indian Affairs, S. 1424 and 2589, 75th Cong., 1st sess., pp. 129–132, 143, 154, 162.

In 1935, the Secretary of the Interior recommended to Congress a bill, authorizing him to make a long-term lease of the reservation lands. The bill was recommended by the House Committee on Indian Affairs, and a similar bill was recommended by the Senate Committee on Indian

Affairs, but both failed of enactment. H. Rep. No. 1521, 74th Cong., 1st sess.; S. Rep. No. 1201, 74th Cong., 1st sess. See also, Hearings, S. Comm., Indian Affairs, S. 1424 and 2589, 75th Cong., 1st sess., pp. 2–7. In 1937, the Secretary recommended enactment of two other bills, one a bill to repeal the provisions of the Act of March 2, 1917, 39 Stat. 976, relating to the making of allotments on the Mission Indian reservations,[8] and the other a bill to authorize the sale of part of the Palm Springs Reservation. The former was reported favorably by the Senate Committee on Indian Affairs, but these two bills also failed of enactment. S. Rep. No. 1238, 75th Cong., 1st sess.; Hearings, S. Comm., Indian Affairs, S. 1424 and 2589, 75th Cong., 1st sess.; Hearings, H. Comm., Indian Affairs, H. R. 7450, 75th Cong., 3d sess.

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[8] This bill was as follows:

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the proviso in the Act of March 2, 1917, appearing on page 976 of volume 39 of the United States Statutes at Large, relating to the making of allotments in severalty to the Indians belonging to and having tribal rights on the Mission Indian Reservations in the State of California be, and the same is hereby, repealed and, until otherwise provided by Congress, the Secretary of the Interior is hereby directed not to perfect or complete any allotments heretofore listed or scheduled to any of said Indians which have not been approved by the Secretary of the Interior prior to the passage of this Act: *Provided, however*, That nothing herein contained shall be construed to deprive any Indian of rights, if any that may have vested prior to the approval of this Act."

Meanwhile, in 1936, eighteen actions for trust patents were filed in the district court with respect to selections listed on the 1927 schedule. The gist of the complaints in these actions was that the appointment of Wadsworth as Special Allotting Agent with instructions to list selections for allotments on the Palm Springs Reservation constituted a determination by the Secretary of the Interior that the Palm Springs Band of Indians had so far advanced in civilization as to be capable of owning and managing allotments in severalty and that the listing and scheduling of the selections for allotments amounted to the making of the allotments. The district court held that selection and scheduling was not equivalent to allotment; that under sections 4 and 5 of the Act of January 12, 1891, 26 Stat. 712, the Secretary had authority in his discretion to approve the selections for allotment or not; that section 3 of the Act of March 2, 1917, 39 Stat. 969, 976, did not repeal this discretionary authority; and that in the absence of his approval of the allotment selections the complainants were not entitled to allotments. Judgment was entered against the complainants. *St. Marie* v. *United States,* 24 F. Supp. 237 (S. D. Cal., 1938). The circuit court of appeals affirmed, holding that the listing of selections for allotment was preliminary and that the approval of the Secretary was required, 108 F. (2d) 876 (C. C. A. 9, 1940). Certiorari was ap-

plied for and was denied on October 14, 1940, because the petition was filed out of time. 311 U. S. 652.

In the following year petitioner instituted the present action, seeking judgment that he was entitled to allotments in severalty on the Palm Springs Reservation (R. 2–48). The complaint alleged that petitioner was qualified for allotment in severalty (R. 2–3, 17–19, 23, 28); that on or about June 7, 1921, the Secretary determined that, in his opinion, the Palm Springs Band of Indians, including petitioner, was so far advanced in civilization as to be capable of owning and managing allotments in severalty, and instructed Wadsworth to make the allotments (R. 3–4); that on or about June 23, 1923, petitioner made his selection for allotment, received from Wadsworth a certificate of selection for allotment, which was stamped, "Not valid unless approved by the Secretary of the Interior," and had his selection listed on official schedules prepared by Wadsworth (R. 4–9, 18–19, 23–24, 28–29); that in October of 1923 Wadsworth, after inquiry made of officials of the Indian Office at Washington, D. C., advised petitioner that he might take possession of the lands selected and have the exclusive use thereof for the purpose of cultivation and planting of early crops and Wadsworth encouraged him in this (R. 10–11, 19–20, 25, 29–30); that Wadsworth represented to them that his certifi-

cate of selection for allotment would be evidence of his vested right to possess, hold and improve the lands pending issuance of trust patents (R. 11–12, 19–20, 25, 29–30); that the Commissioner of Indian Affairs and the Secretary of the Interior represented to him that trust patents would be issued (R. 12, 20, 25, 30); that in reliance upon these acts and representations on the part of the Special Alloting Agent, the Commissioner of Indian Affairs, and the Secretary of the Interior, petitioner entered upon and substantially improved the lands by erecting thereon buildings and other structures suitable for residential and business purposes (R. 12–14, 20–21, 25–26, 30); that they would not have so improved the lands but for such acts and representations (R. 12–14, 20–21, 25–26, 30); that by reason of such acts and representations, the United States is estopped to deny petitioner's title to the lands selected or that trust patents should be issued (R. 14, 32); and that in withholding approval of the allotment selections, the Secretary has acted arbitrarily and unlawfully (R. 33–44). The complaint prayed for a judgment that petitioner was qualified for allotment in severalty; that an allotment had been made to him; that he was entitled to a trust patent therefor; and that a copy of the judgment be certified to the Secretary of the Interior as provided by the Jurisdictional Act of August 15, 1894, 28 Stat. 286, as amended, 25 U. S. C. sec. 345.

On November 29, 1941, respondent filed a motion for dismissal or, in the alternative, for summary judgment based on the affidavits thereto attached and the files, records, pleadings, and further proceedings in the *St. Marie* case (R. 48–50). Attached to the motion was an affidavit by Carl Spinner, Principal Clerk of the Mission Indian Agency, in which it was stated that examination of the records of that Indian Agency showed that the Secretary of the Interior had never approved any selections for allotment on the Agua Caliente or Palm Springs Indian reservation but had disapproved them (R. 50–51).[9] Also attached to the motion was a certificate by E. J. Armstrong, Acting Commissioner of Indian Affairs, in which it was certified that no selections for allotment on that reservation had ever been approved by the Secretary of the Interior (R. 52). In support of the motion, respondent alleged that the subject matter and purpose of petitioner's complaint were the same as those of the complaint in the case of *St. Marie* v. *United States, supra,* and that the only new matter concerned an alleged estoppel, which raised no justiciable issues because the United States is not bound by the un-

[9] The Department of the Interior advises that the Secretary of the Interior disapproved the selections for allotments shown on the 1923 schedule, and that he has never approved those shown on the 1927 schedule.

authorized statements and acts of its officers and agents.

On January 26, 1942, summary judgment was entered on the motion (R. 59–60). On June 30, 1943, the judgment was affirmed by the circuit court of appeals (R. 76–77).

SUMMARY OF ARGUMENT

I

A. It rests in the complete discretion of the Secretary of the Interior whether or not allotments shall be made on the Palm Springs Reservation. Sections 4 and 5 of the Act of January 12, 1891, 26 Stat. 712 (Appendix, *infra*, pp. 54–56) contemplate three steps in the making of allotments on that reservation: (1) an opinion by the Secretary as to the capacity of the Indians to receive allotments; (2) a method or procedure for making such allotments; and (3) approval of the allotments by the Secretary. Each of these steps is under the control and rests in the discretion of the Secretary. The 1891 Act is silent as to the method or manner of making allotments. Therefore, it must be presumed that Congress intended the Secretary, as the agent named to administer the legislation and as head of the Government in charge of Indian affairs, to have authority to prescribe the requisite procedure. R. S. sec. 441, 5 U. S. C. sec. 485; *West* v. *Hitchcock*, 205 U. S. 80, 85; *Parker* v. *Richard*, 250 U. S. 235, 240;

Sunderland v. *United States*, 266 U. S. 226, 234–235; *Mitchell* v. *United States*, 22 F. (2d) 771, 772 (C. C. A. 9). Cf. *Cosmos* v. *Gray Eagle*, 190 U. S. 301; *United States* v. *Morrison*, 240 U. S. 191, 210–211; *United States* v. *Morehead*, 243 U. S. 607. Section 4 of the 1891 Act provides that the Secretary *may* cause allotments to be made, thus implying that Congress intended the Secretary to have full discretionary authority. This will be deemed to be the case, unless the purpose or object of the 1891 Act warrants a contrary conclusion. *Farmers Bank* v. *Fed. Reserve Bank*, 262 U. S. 649, 662–663; *Moore* v. *Illinois Central R. Co.*, 312 U. S. 630, 635–636.

The 1891 Act discloses no positive mandate to the Secretary to make allotments. The provisions and legislative history of the statute reflect no pledge of faith or guarantee on the part of the United States that allotments would be made. S. Rep. No. 74, 50th Cong., 1st sess.; H. Rep. No. 3251, 51st Cong., 2d sess. On the contrary, they fairly show that the underlying policy of the Mission Indian legislation was no more than one of extending the protection of the Government over the Mission Indians. *Ibid.* It cannot be said that this policy of protection justifies the inference that the Secretary was intended to have no discretionary authority as to the making of allotments on the Mission reservations.

B. The Act of March 2, 1917, 39 Stat. 969, 976 (Appendix, *infra*, p. 58) does not repeal the discretionary authority of the Secretary of the Interior under the 1891 Act. It was proposed by the Secretary of the Interior himself in order to enable him to put into effect on the Mission reservations a more equitable and suitable plan of making allotments. H. Rep. No. 397, 63d Cong., 2d sess., pp. 1, 3; Letter, dated January 7, 1916, from the Secretary to the Chairman of the Senate Indian Affairs Committee (reproduced in the Appendix, *infra*, p. 62); S. Rep. No. 962, 64th Cong., 2d sess., p. 15; 54 Cong. Rec., pt. 2, 64th Cong., 2d sess., p. 2063. See, also, Hearings, S. Comm., Indian Affairs, S. 1424 and 2589, 75th Cong., 1st sess., p. 157. The terms of the Act purport only to change the areas in which the Secretary might make allotments, and do not reveal any intent to repeal the discretionary authority vested in the Secretary under the 1891 Act. Under the familiar rule against implied repeals, the Act should not be construed as intended to accomplish any such purpose. *United States* v. *Burroughs*, 289 U. S. 159; *Posadas* v. *National City Bank*, 296 U. S. 497. See opinion, dated April 8, 1937, by Acting Solicitor Kirgis of the Interior Department, Hearings, S. Comm., Indian Affairs, S. 1424 and 2589, 75th Cong., 1st sess., p. 157. That this Act has not been administratively interpreted as not imposing a mandatory duty on the Secretary to make allot-

ments on Mission reservations is shown by the fact that allotments have been made on only eight out of the twenty-seven Mission reservations which were unallotted on March 2, 1917. Hearings, S. Comm., Indian Affairs, S. 1424 and 2589, 75th Cong., 1st sess., pp. 142–153.

C. The appointment of Wadsworth as allotting agent, the listing of selections for allotment, the issuing of certificates, and the scheduling and certifying of the selections to the Secretary of the Interior are not equivalent to a determination by the Secretary to exercise his discretion and make allotments on the Palm Springs Indian Reservation. The Secretary manifestly intended to exercise his discretion as to whether allotments should be made on that reservation after and not before those acts were performed. He must be deemed to have planned to form his opinion as to the capacity of the Palm Springs Indians for allotments at the time when the schedule was submitted for his approval and not earlier. It is only natural to suppose that he sent Wadsworth out to the Mission reservations to do necessary preliminary work and to obtain information essential to the formation of an intelligent opinion on his part as to the capacity of the Mission Indians for allotment. Any contrary view would seem wholly inadmissible because it would mean that the Secretary, merely by appointing Wadsworth, exhausted his discretion and thereafter could not decide not

to make allotments on any of the Mission reservations.

It would be erroneous to conclude that when the 1927 schedule was submitted for his approval, the Secretary had no discretionary power to decide that no allotments should be made on the Palm Springs Indian Reservation, merely because he had instructed Wadsworth to follow and Wadsworth had followed the provisions of the General Allotment Act, as amended (Appendix, *infra*, p. 59–62 in listing and scheduling selections for allotment on that reservation. See Wadsworth's certificate appended to the 1927 schedule (*supra*, p. 7). Prior to the Act of March 2, 1917, *supra*, pp. 16–17, the Secretary had not made the General Allotment Act, as amended, applicable on Mission reservations. And the 1917 Act only required him to use the method or manner of making allotments specified in the General Allotment Act, as amended (see *supra*, p. 59). Cf. *Fairbanks* v. *United States*, 223 U. S. 215. Accordingly, notwithstanding that in accordance with the mandate of the 1917 Act he thereafter instructed Wadsworth to follow the method or manner of making allotments set forth in the General Allotment Act, as amended, he should be regarded as having reserved the right to decide, in his discretion, whether he would approve the 1927 schedule of selections when it was submitted to him, and whether he would make allotments on the Palm Springs Reservation.

D. Even if it be said that the Secretary's discretionary authority under the 1891 Act was not complete, or that if he had such discretion, it was repealed by the 1917 Act, still the Secretary of the Interior has a power of approval over allotments on the Palm Springs Reservation by virtue of section 5 of the 1891 Act (Appendix, *infra*, p. 55), which, obviously, is unaffected by the 1917 Act. This power of approval is no mere formality. It comprehends a wise exercise of discretion consistent with the provisions and purpose of the Mission Indian legislation. R. S. sec. 441, 5 U. S. C. sec. 485; *Williams* v. *United States*, 138 U. S. 514, 524; *Knight* v. *U. S. Land Association*, 142 U. S. 161, 181; *Northern Pac. Ry. Co.* v. *McComas*, 250 U. S. 387, 393; *Payne* v. *United States*, 269 Fed. 198, 200–201 (App. D. C.); *Lemieux* v. *United States*, 15 F. (2d) 518, 521 (C. C. A. 8); *Mitchell* v. *United States*, 22 F. (2d) 771, 772 (C. C. A. 9). Cf. *United States* v. *Wilbur*, 283 U. S. 414, 419; *Chippewa Indians* v. *United States*, 301 U. S. 358, 378–379.

As will appear below, the Secretary has determined that it would be inequitable and detrimental to the Palm Springs Band of Indians as a whole to approve any allotments on their reservation. No provision of the Mission Indian legislation precludes the Secretary from taking into consideration the equities and needs of the Band as a whole in determining whether to approve any

allotments. Indeed, the basic purpose and policy of that legislation (see *supra*, pp. 14–15), indicate that the considerations of administrative policy underlying his actions are wholly proper and authorized by law. The Secretary should not be compelled to carry through a plan of allotment in severalty which in his judgment will operate contrary to the best interests of the Palm Springs Band of Indians, but he should be permitted to stay his hand and seek a plan which would be more in the interest of that Band.

E. In view of the great increase in value of the selected lands by reason of proximity to the the city of Palm Springs, the Secretary of the Interior judges that it would be inequitable and unjust to the Palm Springs Band of Indians to carry through any plan of allotment on their reservation. He believes that that increase in value, which he regards as essentially a tribal asset, presents an administrative problem which should be solved in the interests of the Band as a whole. On the facts involved, it would appear that the Secretary's judgment in favor of the Band as a whole is wise. And it is in no way unfair to those who have made selections for allotment. Any interest they have in the lands selected is not a vested interest and is both subsequent and subordinate to that of the Band. They will participate along with the others of the

Band in the benefits resulting from the solution which will be made of the Palm Springs Indian problem, and it is not improbable that they will benefit more if no allotments are made than they would otherwise.

II

Viewing the allegations of the complaint in their entirety, it fairly appears that petitioner was aware that his only right, if any, to the lands involved was a possessory one and, especially in view of the allegation (R. 9) that he had occupied and substantially improved the lands long prior to issuance of the certificates of selection, that the alleged acts and representations were not the motivating cause inducing him to erect thereon "buildings, and other permanent structures and improvements * * * suitable for use for residential, commercial, and business purposes" (R. 12–13). For this reason alone, petitioner's contention regarding estoppel is not well-founded.

In any event, his plea of estoppel is not well made as against the United States which is not bound by the unauthorized acts of its officers and agents. *Utah Power & Light Co.* v. *United States*, 243 U. S. 389, 409; *Yuma Water Assn.* v. *Schlecht*, 262 U. S. 138, 144; *United States* v. *San Francisco*, 310 U. S. 16, 31–32. The alleged acts and representations relied upon are outside of and inconsistent with the authority of the Secretary of the Interior under the Mission Indian legislation,

who is thereunder required not to approve the selections for allotment on the Palm Springs Reservation when to do so would in his judgment be inequitable and inimical to the interests of the Palm Springs Band of Indians as a whole. Petitioner's assertion that the alleged acts and representations relied upon amount to an administrative interpretation or rise to the dignity of a rule or regulation under the Mission Indian legislation is plainly unfounded, since it clearly appears that the Secretary's understanding is to the contrary. Cf. *United States* v. *San Francisco*, 310 U. S. 16, 31–32.

ARGUMENT

Introduction.—The basic jurisdictional Act of August 15, 1894, 28 Stat. 286, 305, as amended, 25 U. S. C. sec. 345 (set forth in the Appendix, *infra*, p. 59) makes provision for judicial determination of claims by Indians of rights to an allotment of land. It provides that a judgment or decree in favor of any such claimant "shall have the same effect, when properly certified to the Secretary of the Interior, as if such allotment had been allowed and approved by him." This Act presupposes that an allotment has been made but has not been allowed or approved by the Secretary of the Interior and empowers the court, upon a determination that the disallowance of the allotment is unlawful, to allow or approve the allotment as the Secretary should have done. Cf.

Hy-yu-tse-mil-kin v. *Smith*, 194 U. S. 401; *United States* v. *Payne*, 264 U. S. 446; *Bonifer* v. *Smith*, 166 Fed. 846 (C. C. A. 9); *Leecy* v. *United States*, 190 Fed. 289 (C. C. A. 8). It does not authorize the court, however, to make an allotment or to determine whether an allotment should be made. Cf. *Chase, Jr.* v. *United States*, 256 U. S. 1; *Woodbury* v. *United States*, 170 Fed. 302 (C. C. A. 8); *Lemieux* v. *United States*, 15 F. (2d) 518 (C. C. A. 8); *Mitchell* v. *United States*, 22 F. (2d) 771 (C. C. A. 9); 55 Interior Decisions 295; 57 *id.* at p. 13.

In *St. Marie* v. *United States*, 24 F. Supp. 237, affirmed, 108 F. (2d) 876 (C. C. A. 9), certiorari denied, 311 U. S. 652, involving eighteen claims to allotments of land on the Palm Springs Indian Reservation, the Government contended and it was held that no allotments of land had been made on that reservation, and that steps which had been taken looking toward the allotment of lands thereon were merely preliminary and did not amount to the making of allotments. Thus the question did not arise in that case, and there was no occasion to decide, whether if the case were truly one where allotments had been made but disallowed by the Secretary, the approval of the Secretary had been withheld for legally sufficient reasons. In the instant case, the Government moved (R. 48–54) for summary judgment based on the record in the *St. Marie* case and on affidavits showing that there

had never been an approval by the Secretary of the Interior of the selections for allotments involved. And, consistent with its own decision and that of the circuit court of appeals in the latter case, the district court granted summary judgment for the Government. The court below affirmed this action. Hence, the record here does not fully disclose the reasons why the Secretary has not made allotments on the Palm Springs Reservation. It is beyond question, however, that, in not making allotments on that reservation, the Secretary has been motivated by considerations of policy which are wholly proper and which sustain his action.

I

PETITIONER HAS NO RIGHT TO ALLOTMENTS IN SEVERALTY ON THE PALM SPRINGS INDIAN RESERVATION

Before petitioner can be said to have rights to allotments in severalty on the Palm Springs Reservation, three factors must be established: (1) that the Secretary of the Interior has no discretionary authority as to whether and when allotments shall be made on that reservation; (2) that, because he appointed a Special Allotting Agent for the Mission Indian Reservation and authorized and permitted selections for allotment to be made on that reservation, certificates therefor to be issued, and schedules of allotments to

be prepared and certified to him, he has made allotments in severalty thereon; and (3) that if he has made allotments thereon, he has withheld his approval thereof without lawful reason.

We contend that the Secretary of the Interior does have discretionary authority as to whether and when allotments shall be made on that reservation; that so far he has not made allotments thereon; and that, therefore, petitioner's claim herein must fail because he cannot establish both of the first two essential grounds enumerated above. Although not material to support this contention, in connection therewith we will show that the Secretary does have sound reason for not exercising, in favor of petitioner or any of the Palm Springs Indians, his discretionary authority as regards the making of allotments. We further contend that even if the Secretary has no complete discretion as to the making of allotments, he does have authority, by virtue of his power of approval over allotments, to withhold his approval thereof for good and sufficient reason, and that he does have lawful and proper reason for not approving any allotments on the Palm Springs Indian Reservation.

A. *The Act of January 12, 1891, vests discretionary authority in the Secretary of the Interior as to the making of allotments.*—Section 4 of the Act of January 12, 1891, 26 Stat. 712 (Appendix, *infra*, pp. 54–55), provides that whenever any of

the Indians residing upon any of the Mission reservations "shall, *in the opinion of the Secretary of the Interior,* be so advanced in civilization as to be capable of owning and managing land in severalty, the Secretary of the Interior *may* cause allotments to be made to such Indians, out of the land of such reservation" in specified quantities. (Italics added.) Section 5 of that Act (Appendix, *infra,* p. 55) provides that "upon the approval of the allotments provided for in the preceding section by the Secretary of the Interior he shall cause" individual trust patents to be issued therefor.

These two sections contemplate that three steps shall be taken before an allotment is made: (1) the formation of the requisite opinion by the Secretary of the Interior; (2) the establishment and fulfillment of the requirements of a mechanical procedure for making of allotments; and (3) the approval of the allotments by the Secretary of the Interior. The first mandatory requirement of these sections—the provision of section 5 that trust patents "shall" be issued—comes into play only after the final step, approval of the allotment by the Secretary of the Interior, has taken place. Each of these three steps is under the control and rests in the complete discretion of the Secretary.

This is so, first, because the legislation is completely silent as to the manner or method by which allotments shall be made. Since an allotment procedure would be needed, and since Congress designated the Secretary to make the allotments, it is natural to suppose that Congress intended him to have authority to define the necessary procedure. Also, where, as here, the legislation requires it, it is presumed that Congress intended the Secretary, as head of the Government Department in charge of Indian affairs to have authority to prescribe requisite administrative procedure. R. S. sec. 441, 5 U. S. C. sec. 485; *West* v. *Hitchcock*, 205 U. S. 80, 85; *Parker* v. *Richard*, 250 U.S. 235, 240; *Sunderland* v. *United States*, 266 U. S. 226, 234–235; *Mitchell* v. *United States*, 22 F. (2d) 771, 772 (C. C. A. 9). Cf. *Cosmos* v. *Gray Eagle*, 190 U. S. 301; *United States* v. *Morrison*, 240 U. S. 192, 210–211; *United States* v. *Morehead*, 243 U. S. 607.

In this respect, the Mission Indian Act of January 12, 1891 (Appendix, *infra*, pp. 52–58) is in complete contrast to the provisions of the General Allotment Act of February 8, 1887, 24 Stat. 388.[10] They explicitly provide who shall make and how he shall make a selection for allotment; that the allotments "shall be made" by specified

[10] The contrasted provisions of the General Allotment Act of 1887 are set forth in the Appendix, *infra*, pp. 59–62.

allotting agents; that the allotments shall be certified to the Secretary of the Interior by these agents; and that upon approval of the allotments provided for in the Act, the Secretary shall issue trust patents. Thus, in the General Allotment Act, Congress exercised its own judgment and discretion and prescribed in full detail how and when allotments should be made, leaving no room for the exercise of judgment and discretion by the Secretary of the Interior.

That the Mission Indian legislation does vest discretionary authority in the Secretary is evident, secondly, because section 4 of the 1891 Act uses merely permissive language; it states that he *may* cause allotments to be made. From this, the inference is that Congress intended the Secretary to have full discretionary authority to make or not to make allotments as he deemed fit. This will be deemed to be the case, unless the purpose or object of the 1891 Act compels a contrary conclusion. *Farmers Bank* v. *Fed. Reserve Bank,* 262 U. S. 649, 662–663; *Moore* v. *Illinois Central R. Co.,* 312 U. S. 630, 635–636. And that the Mission Indian Act of 1891 requires no contrary conclusion seems quite clear. The Act of 1891 discloses no policy or purpose inexorably to require the Secretary to make allotments. In the first place, nothing in the legislative history or the provisions of the statute (Appendix, *infra,* pp. 52–58) reflects a pledge of faith or guarantee on the part of the United

States that allotments in severalty would be made. There was no treaty with the Mission Indians which so obligated the United States. Nor was there any promise from the United States to them that allotments in severalty would be made.[11] S. Rep. No. 74, 50th Cong., 1st sess.; H. Rep. No. 3251, 51st Cong., 2d sess. And in the second place, the provisions and legislative history of the 1891 Act fairly show that the underlying policy of the legislation was no more than one of extending the protection of the Government over the Mission Indians. The policy was to settle the Mission Indians on reservations, to protect them from interference with their occupancy of the lands of those reservations, and at the expiration of a prescribed period of time to relinquish either to the band of Mission Indians or to individual members thereof, as the operation of the allotment provisions of section 4 of the Act should then require, the title of the United States to the lands they occupied. S. Rep. No. 74, 50th Cong., 1st sess.; H. Rep. No. 3251, 51st Cong., 2d sess. This policy of protection is wholly unlike the policy of the General Allotment Act of February 8, 1887, 24 Stat. 388, and related or similar legislation, which was, through the very medium of allotment in

[11] For contrasting cases where the United States pledged its faith or made a promise of allotments, see *Halbert* v. *United States*, 283 U. S. 753; *Chase, Jr.* v. *United States*, 256 U. S. 1.

severalty, to seek the added objectives of dissolving tribal organization, breaking up the reservation system, and assimilating Indians to the white civilization surrounding them. Cohen, *Handbook of Federal Indian Law* (1942), pp. 206–233. It can hardly be said that the policy of protection bespoken by the Mission Indian Act of 1891 clearly compels the view that the Secretary was not intended to have discretionary authority thereunder in regard to the making of allotments.

B. *The Act of March 2, 1917, does not repeal the discretionary authority vested in the Secretary of the Interior by the 1891 Act.*—This Act, 39 Stat. 969, 976 (Appendix, *infra*, p. 58) originated from the then Secretary of the Interior. He found that on the Morongo Mission Indian Reservation the more influential and aggressive Indians were occupying the larger quantities of the best land, to the exclusion of the more timid Indians. In this situation the Secretary of the Interior felt that the plan of allotment provided by section 17 of the Act of June 25, 1910, 36 Stat. 859, would operate more equitably than the one provided by section 4 of the Mission Indian Act of 1891. Also, he thought that it would be a wiser and better plan to provide, as in the 1910 Act, for allotments to each member of the Morongo band, rather than, as in section 4 of the 1891 Act, for heads of families and adult single persons, in order to eliminate injustice to orphan children, married women, and divorced

wives and their children. See H. Rep. No. 397, 63d Cong., 2d sess., pp. 1, 3; Letter, dated January 7, 1916, from the Secretary to the Chairman of the Senate Indian Affairs Committee.[12] Accordingly, he proposed several bills to Congress for the purpose of permitting the use of the allotment provisions of the 1910 Act on the Morongo Reservation. *Ibid.* Later, he sought authority to apply those provisions on the Mission Indian reservations generally, and such authority was finally provided by the Act of March 2, 1917. S. Rep. No. 962, 64th Cong., 2d sess., p. 15; 54 Cong. Rec., pt. 2, 64th Cong., 2d sess., p. 2063. See, also, Hearings, S. Comm., Indian Affairs, S. 1424 and 2589, 75th Cong., 1st sess., p. 157. The terms of the 1917 Act (Appendix, *infra*, p. 58) purport only to change the areas that the Secretary may allot. The historical background of the Act indicates that there was no purpose to take away from the Secretary the discretionary authority he had under section 4 of the 1891 Act. And under the familiar rule against implied repeals, it should not be inferred that the Act was intended to accomplish any such purpose. *United States* v. *Burroughs*, 289 U. S. 159; *Posadas* v. *National City Bank*, 296 U. S. 497. See opinion, dated April 8, 1937, of Acting Solicitor Kirgis of the Interior Department, Hearings, S. Comm., Indian Affairs, S. 1424 and 2589, 75th Cong., 1st sess., p. 157.

[12] Reproduced in the Appendix, *infra*, p. 62.

Petitioner asserts (Pet. 10–11) that the 1917 Act has been administratively interpreted as mandatorily requiring that allotments be made on the Mission Indian Reservations. He cites Wadsworth's certificate appended to the 1927 schedule which recites that "the allotments shown hereon were made in accordance with the provisions of the Act of Congress of February 8, 1887 (24 Stat. L. 388), as amended by the Act of June 25, 1910 (36 Stat. L. 855), and supplemented by the Act of March 2, 1917 (39 Stat. L. 969–76)."[13] It is plain, however, that this certificate in no way proves or even tends to show an administrative understanding that the 1917 Act required the Secretary to make allotments. Petitioner also refers to two letters, one from the Secretary of the Interior to the Attorney General and another from the latter to the United States District Attorney at Los Angeles. Those letters touch upon the subject of whether or not the 1917 Act is mandatory, but they hardly reflect any administrative interpretation, understanding, or practice; they simply moot a point of law. The best proof of the administrative viewpoint lies in the fact that subsequent to the 1917 Act the administrative authorities have made allotments on only eight out of the twenty-seven Mission reservations which were unallotted on March 2, 1917. Hear-

[13] As to Wadsworth's instructions, see letter dated January 26, 1922, set forth in the Appendix, *infra*, p. 66.

ings, S. Comm., Indian Affairs, S. 1424 and 2589, 75th Cong., 1st sess., pp. 142–153.

C. *The Secretary of the Interior has not exercised his discretionary authority to make allotments on the Palm Springs Reservation.*—What has been done so far on the Palm Springs Reservation—the appointment of Wadsworth, the listing of selections, the issuing of certificates, and the scheduling and certifying of the selection to the Secretary—does not amount to the making of allotments so that it must now be said that the Secretary has exercised his discretion to determine whether allotments should be made on that reservation and has made allotments thereon. As shown, *supra,* pp. 25–30, sections 4 and 5 of the 1891 Act (Appendix, *infra,* pp. 54–56) contemplated three steps: (1) an opinion; (2) an allotment procedure; and (3) approval of the allotments. That the Secretary intended to exercise his discretionary power at the time of the last step and not before, and so may not be deemed already to have exercised his discretionary authority and made allotments on the Palm Springs Reservation, would seem clearly to be true, because he can only be regarded as having intended to form the requisite opinion at time of approval and not earlier. The Secretary appointed Wadsworth as allotting agent at large for the Mission reservations, and there are thirty such reservations. The opinion required of the Secretary by section 4 of the 1891 Act is whether "any of the Indians re-

siding upon any" of those reservations is so advanced as to be capable of owning and managing land in severalty. The only natural supposition is that the Secretary appointed Wadsworth and sent him out to those reservations for the purpose of doing necessary preliminary work and of obtaining the information and particulars which would be essential to the intelligent formation by the Secretary of the opinion required of him. Any contrary view would seem wholly inadmissible because it would mean that merely by appointing Wadsworth the Secretary exhausted his discretionary authority and thereafter could not decide whether any particular Mission reservation should be allotted. Compare the opinion required of him with that required of the President by section 1 of the General Allotment Act of 1887 (Appendix, *infra*, p. 60). That section provides that the President is authorized "whenever in his opinion any reservation or part thereof is advantageous for agricultural and grazing purposes" to cause the reservation to be surveyed and to allot the lands thereof. The opinion there required of the President would naturally precede any allotment process, but the opinion required of the Secretary by section 4 of the 1891 Act would naturally come at the end of an allotment process. Accordingly, it must be deemed that the work done and the acts performed by Wadsworth were wholly preliminary and that when the schedules prepared by Wadsworth were submitted the

Secretary could then decide in his discretion that the Palm Springs Reservation should not be allotted.

Nor may it be deemed, because as shown by Wadsworth's certificate appended to the 1927 schedule (*supra*, p. 7), the Secretary instructed [14] the allotting agent to follow and Wadsworth did follow the allotment provisions of the General Allotment Act of February 8, 1887, 24 Stat. 388, as amended by the Act of June 25, 1910, 36 Stat. 855, and supplemented by the Act of March 2, 1917, 39 Stat. 969, 976, that the Secretary of the Interior determined that the members of the Palm Springs Band of Indians were capable of owning and managing land in severalty, and made the allotment provisions of the General Allotment Act, as amended, effective on their reservation, in such manner that he deprived himself of any discretionary power to determine that allotments should not be made on that reservation, when the schedule of selections for allotments thereon was certified to him for his approval. Prior to March 2, 1917, the Secretary of the Interior had not made the allotment provisions of the General Allotment Act, as amended, applicable to Mission Indian reservations. And, as has been seen, *supra*, pp. 30–31, he requested authority from Congress to use those provisions because he believed they would permit the application to the Mission reservations

[14] The instructions appear in the Appendix, *infra*, p. 66.

of a more equitable and satisfactory plan of allotment. By the Act of March 2, 1917, 39 Stat. 969, 976 (Appendix, *infra*, p. 58), Congress required him to use those provisions on the Mission reservations. But it did not thereby put those provisions in force with respect to Mission reservations, in such manner as to deprive the Secretary of the Interior of his discretionary authority under section 4 of the Mission Act of 1891 to determine whether allotments should be made on a particular Mission reservation and to make the General Allotment Act, as amended, controlling as to the right of Mission Indians to allotments on their reservations. Compare *Fairbanks* v. *United States*, 223 U. S. 215, where this Court said (pp. 223–224) that the Steenerson Act of 1904 was controlling as to kind of land to be allotted on the White Earth Indian Reservation in Minnesota, as the reference therein to the General Allotment Act of 1887 only went to the manner of allotment. The Secretary was left free to determine, in his discretion, how and when allotments should be made on the Mission Indian reservations. And the same considerations which were indicated above require the view, notwithstanding that he instructed Wadsworth to follow the provisions of the General Allotment Act, as amended, and Wadsworth did follow those provisions, that the Secretary reserved the power to decide, in his discretion, that he would not approve the schedule

of selections submitted to him and that no allotments should be made on the Palm Springs Reservation.

The complaint in paragraphs II and III (R. 3, 4) in substance alleges that, on or about June 7, 1921, the Secretary determined, in his opinion, that the Palm Springs Band of Indians, including petitioner, were capable of owning and managing allotments, that he appointed Wadsworth to make allotments on the Palm Spring Reservation, and that thereafter Wadsworth did make allotments to that Band of Indians, including petitioner. Accordingly, it is evident that petitioner adopts the theory that the Secretary completely exercised his discretionary power under the Mission Indian legislation when he appointed Wadsworth, thus relinquishing all further discretionary power of control over the making of allotments, and that thereafter Wadsworth with full delegated power to do so made the allotments. The reasons set forth in the preceding paragraph make it plain that this theory is a highly improbable one. But, however unlikely, it would be supportable if it were true that the Secretary of the Interior did in fact determine, on or about June 7, 1921, that, in his opinion, the Palm Springs Band of Indians, including petitioner, had the requisite capacity. The judgment of the district court conclusively determines, however, that such was not the case.

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The complaint pleaded that the Secretary had made such a determination, thus alleging a fact which the Government aeknowledges is a material one. The Government by motion for summary judgment based on the record in the *St. Marie* case (R. 48–49) raised the question whether the fact thus alleged presented any genuine issue. The record in the *St. Marie* case showed (pp. 23–24, Fdg. II) that the district court after trial had there found that it is not true that the Secretary of the Interior had determined, on June 7, 1921, or at any other time, that in his opinion the Palm Springs Band of Indians were so advanced in civilization as to be capable of owning or managing land in severalty; that it is not true that he caused allotments to be made to any of the Indians of that Band or made allotments of the lands of their reservation; that it is not true that he caused to be prepared any *official* schedule of allotments for the Palm Springs reservation; and that it is not true that Wadsworth was vested with authority of law or otherwise to make allotments of lands or that he did allot any lands on that reservation. [Italics supplied.] The *St. Marie* case was in the nature of a test case for the purpose of having it judicially determined whether or not the Palm Springs Reservation is an allotted reservation. The present case had the same purpose. The situation of petitioner in this case is the same as was that of the Indians involved in the *St. Marie* case.

Both cases turn upon the same facts and the same law. Upon the motion for summary judgment in this case, it was incumbent upon the district court to examine into the genuineness of the issue tendered by the allegation of the complaint that the Secretary had determined the Palm Springs Band of Indians to be capable of holding allotments. And its judgment granting that motion implies a finding that that allegation presented no genuine issue. Hence, it is to be taken here as established that the Secretary has never determined that any Palm Springs Indians are capable of owning and managing allotments in severalty.[15]

D. *Under his power of approval in section 5 of the 1891 Act, the Secretary may lawfully withhold his approval of allotments on the Palm Springs Reservation.*—Whether it be said that the Secretary has no complete discretionary authority under section 4 of the 1891 Act, or that if he had, it was repealed by the 1917 Act, still section 5 of

[15] Petitioner states (Pet. 7) that the fact he alleged is a well-pleaded fact which is admitted by a motion for summary judgment, but he is clearly mistaken. F. R. C. P. 56. As to the propriety of the district court's grant of summary judgment on the basis of knowledge obtained from its own public records, see: Calif. Code of Civil Procedure (Deering 1937) sec. 1875; 3 Moore's Federal Practice (1938) secs. 56.03, 56.04, pp. 3183–3185; *Fletcher* v. *Evening Star Newspaper Co.*, 114 F. (2d) 582, 586–587 (App. D. C.), certiorari denied, 312 U. S. 694; *United States* v. *City of Philadelphia, etc.*, Nos. 8354, 8404, C. C. A. 7, decided January 7, 1944.

the 1891 Act—the provisions of which, of course, are not affected by anything in the 1917 Act—requires his approval of allotments on Mission reservations. That approval is no mere formality. It comprehends a wise exercise of judgment consistent with the provisions and purpose of the Mission Indian legislation. R. S. sec. 441, 5 U. S. C. sec. 485; *Williams* v. *United States*, 1[illegible] U. S. 514, 524; *Knight* v. *U. S. Land Association*, 142 U. S. 161, 181; *Northern Pac. Ry. Co.* v. *McComas*, 250 U. S. 387, 393; *Payne* v. *United States*, 269 Fed. 198, 200-201 (App. D. C.); *Lemieux* v. *United States*, 15 F. (2d) 518, 521 (C. C. A. 8); *Mitchell* v. *United States*, 22 F. (2d) 771, 772 (C. C. A. 9). Cf. *United States* v. *Wilbur*, 283 U. S. 414, 419; *Chippewa Indians* v. *United States*, 301 U. S. 358, 378–379.

As will appear below, the Secretary has concluded that it would be inequitable and detrimental to the Palm Springs Band of Indians as a whole to approve any allotments on their reservation. No provision of the Mission Indian legislation precludes the Secretary from taking into consideration the equities and needs of the Band as a whole in determining whether to approve any allotments. Nor does the basic purpose and policy of that legislation (see *supra*, pp. 52–58). Thus, it would seem that the Secretary is under no compulsion to carry through a plan of allotment in severalty which in his judgment will

operate contrary to the best interests of the Palm Springs Band of Indians, but may stay his hand and seek a plan which would be more in the interest of that Band.

E. *The Secretary of the Interior acted properly in not making allotments on the Palm Springs Reservation.*—The Secretary of the Interior has withheld his approval of the selections for allotment because in his judgment circumstances require that the Agua Caliente or Palm Springs Indian Reservation be held in a tribal status rather than allotted in severalty. Hearings, S. Comm., Indian Affairs, S. 1424 and 2589, 75th Cong., 1st sess., pp. 129–132, 143, 154, 162. As shown by the data contained in the hearings cited and other material which will be cited herein, three factors combined to cause him to form this judgment. In the first place, many of the Indians on that reservation oppose any plan of allotment. This opposition existed when the 1923 schedule of selections for allotment was presented for approval and led the Secretary to direct that a new schedule be prepared listing only those Indians who wanted allotments.[16] Even after the 1927 schedule was prepared showing only voluntary

[16] Superintendent Ellis' letter to Commissioner of Indian Affairs, dated November 26, 1923; Commissioner Burke's letter to the Secretary of the Interior, dated December 22, 1926; and Assistant Commissioner Meritt's letter to Wadsworth, dated January 8, 1927, set forth in the Appendix, *infra*, at p. 70, p. 73, and p. 76, respectively.

selections, opposition to allotment in severalty continued among the majority of the Indians. Secondly, while the Mission Indian legislation contemplated allotment for agricultural purposes, the physical situation on the reservation was not suitable to allotment for such use because of a lack of water for irrigation. And, finally, the city of Palm Springs having developed into a famous winter resort, much of the area listed for allotment had become very valuable for resort purposes and development by reason of close proximity to the city.[17] This value could be very great if the land were retained in a tribal status and dealt with as a whole as opportunity and the best interests of the tribe might dictate, but would be largely destroyed if a program of allotment in severalty were consummated. It was felt that essentially this value was a tribal asset, that the tribe as a whole had a just and equitable claim to it, and that it would be inequitable to carry out a program of allotment in severalty which would result in this valuable land being divided among a few members of the tribe who had made selections at a time when the land had no such special value and the remaining members of the tribe being not only denied any share in it but also left to choose from land of no particular value for their own allotments.

[17] Superintendent Ellis' letter to the Commissioner, dated August 2, 1928, set out in the Appendix, *infra*, p. 79.

In 1935, when it seemed likely that a long-term lease of the reservation land could be made on terms favorable to the tribe, the Secretary recommended to Congress a bill to empower him to make such a lease. The bill proposed to authorize a ninety-nine year lease of all or part of the reservations, reserving to the tribe all mineral rights and such lands and waters as the tribe might select for its own use. The lease was to guarantee the tribe "a minimum cash payment annually equal to the net revenue the Indians now derive from the use or rental of the property to be leased," and was to contain provisions granting the tribe "a participating interest of at least 20 per centum of the gross revenues derived by the lessee or lessees from ground subleases and at least 10 per centum of all other revenues derived by the lessee or lessees from the land leased." The revenues under the lease were to be deposited in the Treasury at interest of four per cent per annum and expended on behalf of the tribe as Congress should direct. The bill was reported favorably by the House Committee on Indian Affairs, and a similar one was reported favorably by the Senate Committee on Indian Affairs, but the two bills failed of enactment. H. Rep. No. 1521, 74th Cong., 1st sess.; S. Rep. No. 1201, 74th Cong., 1st sess. See also Hearings, S. Comm., Indian Affairs, S. 1424 and 2589, 75th Cong., 1st sess., pp. 2–7.

In 1937, the Secretary recommended passage of a bill to authorize sale of lands on the Palm Springs reservation. The bill proposed to authorize the sale of such of the reservation lands as the Secretary might deem advisable and in such portions as he might deem desirable in order to secure the best possible price, reserving water rights to the tribe, together with sufficient land to provide homesites for the Indians. No sale was to be made unless the selling price was consented to by a majority of the adult members of the tribe or a board of disinterested appraisers appointed by the Secretary, after hearing and investigating any objections the tribe might have to the sale price, determined the objections to be unreasonable or capricious and the sale price to be adequate. The proceeds from any sale were to be deposited in the Treasury to the credit of the tribe and at annual interest of four percent. The Secretary was to be authorized to pay individual Indians from the proceeds of any sale the reasonable value of any improvements they might have on the lands sold. He was also to be authorized to expend not to exceed $100,000.00 in the building of homes and community buildings and for general use in rehabilitating individual members of the tribe. Hearings, H. Comm., Indian Affairs, H. R. 7450, 75th Cong., 3d sess., pp. 1–6. This bill also failed of enactment.

In 1937, also, the Secretary recommended enactment of legislation (See proposed bill, *supra*,

p. 9, n. 8) repealing the portion of the Act of March 2, 1917, 39 Stat. 969, 976, relative to the making of allotments on the Mission Indian reservations. This bill dealt with all of the Mission Indian reservations, and its passage was recommended principally because the Mission Indians in general were opposed to allotting of their reservations in severalty and the governmental policy as to the making of allotments on Indian reservations had been modified.[18] The bill contained a clause saving vested rights to allotment, if any, of Mission Indians. It was supported by the Mission Indians generally. The principal opposition to it was from the attorney for the Indians on the Palm Springs Reservation, whose selections for allotment were involved in the then pending *St. Marie* case. The bill was reported favorably by the Senate Committee on Indian Affairs but was not enacted. S. Rep. No. 1238, 75th Cong., 1st sess.; Hearings, S. Comm., Indian Affairs, S. 1424 and 2589, 75th Cong., 1st sess.

[18] See Indian Reorganization Act of June 18, 1934, 48 Stat. 984, which provides (secs. 1, 18) that no lands of any Indian reservation shall be allotted in severalty where the Indians have not voted against application of the Act to their affairs. Hence, the proposed bill would only apply to those Mission Indian reservations where the Indians had voted against application of the Indian Reorganization Act. The Palm Springs Reservation was among those to which the bill would apply, the Indians thereon having voted against application of the Indian Reorganization Act.

Thus, it will be seen that an administrative problem exists on the Palm Springs Reservation which involves conflicting interests of some members of the Palm Springs Band of Indians and of the Band as a whole and which requires the working out of an equitable solution. As the legislation he has proposed to Congress indicates, the Secretary of the Interior believes that the problem should be resolved in the interest of the Band as a whole, and that ultimately a final solution may have to be arrived at through action of the Congress. On the facts involved, it would appear that the Secretary's judgment in favor of the Band as a whole is wholly reasonable. And it is in no way unfair to those Indians who have made selections for allotment. Any interest they have in the lands selected is not a vested interest and is both subsequent and subordinate to that of the Band. They will undoubtedly participate along with the others of the Band in the benefits resulting from the solution which will be made of the Palm Springs Indian problem, and it is not improbable that they will benefit more if no allotments are made than they would otherwise.

II

THE UNITED STATES IS NOT ESTOPPED TO DENY THAT PETITIONER IS ENTITLED TO ALLOTMENTS IN SEVERALTY

Petitioner asserts (R. 10–12) that the United States is estopped to deny that he is entitled to

allotments in severalty because (1) on or about October 26, 1923, "the Indian authorities at Washington, D. C." through Wadsworth advised him that he might enter upon and possess the lands selected "for the purpose of cultivation and planting of early crops," and Wadsworth encouraged him to do this; (2) Wadsworth advised him that his certificate of selection "would be evidence of complainant's vested right and authority to possess, hold, and improve the said lands * * *"; and (3) the Commissioner of Indian Affairs and the Secretary of the Interior stated and represented to him "that a patent in trust would issue * * * covering * * * said lands * * * by reason of said selection, scheduling and certificates for allotment * * *."

The complaint also alleges (R. 12–13) that by reason of those acts and representations petitioner "did improve said lands by erecting thereon buildings, and other permanent structures and improvements, assigned for and suitable for use for residential, commercial, and business purposes, productive of income and revenue, and equipped with modern conveniences for the use, maintenance and operation thereof and the continuous permanent improvement of said lands." The complaint further alleges (R. 9) that long prior to the issuance and delivery of the certificate of selection petitioner "had been in actual physical possession of a portion of the said lands so selected

by him for allotment, had actually resided thereon, and had erected valuable buildings and improvements thereon." It further alleges (R. 3) that petitioner is an Indian who has adopted "the habits, ways, and methods of living of the civilized life" and "is possessed of a degree of education and intelligence above the average of any race."

In view of the allegations of the complaint taken as a whole, it is manifest that the acts and representations upon which petitioner grounds his claim of estoppel were not such as to warrant his believing that he had a right to allotments in severalty or had a vested title to the lands he selected; that implicit in those acts and representations was the fact that petitioner would have no vested right or title to those lands until the Secretary approved the selections for allotment and issued trust patents; and that there was a consciousness of this on petitioner's part. It seems plain, also, that it fairly appears from these allegations that petitioner was aware that his only right, if any, to the lands involved was a possessory one and, especially in view of the allegation that he had occupied and substantially improved the lands long prior to the issuance of the certificates of selection, that the alleged acts and representations were not the motivating cause which induced him to erect on the selected lands "buildings, and other permanent structures and improvements * * * suitable for use for

residential, commercial, and business purposes." As has been shown, the Secretary's approval of the selections for allotment is a condition precedent to the acquisition by petitioner of any final right or title to the lands selected, and petitioner is presumed to have known this to be so. On the face of this complaint it is hardly possible to conclude that petitioner was unaware of or misled as to the fact that he had no vested right or title to the lands he selected, when he made the substantial and permanent improvements referred to.

In any event petitioner's plea of estoppel against the United States is not well made. As he well recognizes (Pet. 12), the United States is not bound or estopped by the unauthorized acts of its officers or agents. *Utah Power & Light Co.* v. *United States,* 243 U. S. 389, 409; *Yuma Water Assn.* v. *Schlecht,* 262 U. S. 138, 144; *United States* v. *San Francisco,* 310 U. S. 16, 31–32. It is plain that the United States may in no way be bound by any acts and representations by Wadsworth and the Commissioner of Indian Affairs, since they are subordinate officers to whom no final administrative authority was ever delegated by Congress. And as for the acts and representations attributed to the Secretary, to whom administrative authority was delegated by Congress, it is clear that the Mission Indian legislation does not sanction or permit of his concluding the rights of the United States and of the Palm Springs

Band of Indians by a representation such as he is here alleged to have made. As has been seen, the Mission Indian legislation authorized and required the Secretary of the Interior not to approve the selections for allotments when in his judgment it would be inequitable to, and inimical to the interests of, the Palm Springs Band of Indians as a whole to do so. It follows therefrom that a representation such as alleged would be outside of and inconsistent with his authority under that legislation. Hence, a plea of estoppel grounded on such an act or representation will not lie against the United States, for otherwise the policy and purpose of the Mission Indian legislation requiring the protection of the interests of the Palm Spring Band of Indians as a whole as regards the allotment problem on their reservation would be frustrated. *Ibid.* No weight may properly be attached to petitioner's assertion that the representation by the Secretary amounts to an administrative interpretation of the Mission Indian legislation or to the dignity of a rule or regulation thereunder, since it so plainly appears that the understanding of the Secretary of the Interior is definitely to the contrary. Cf. *United States* v. *San Francisco*, 310 U. S. 16, 31–32.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment below should be affirmed.

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I have authorized the filing of this brief.

CHARLES FAHY,
Solicitor General.

MARCH 1944.

APPENDIX

1. The Act of January 12, 1891, 26 Stat. 712, is as follows:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That immediately after the passage of this act the Secretary of the Interior shall appoint three disinterested persons as commissioners to arrange a just and satisfactory settlement of the Mission Indians residing in the State of California, upon reservations which shall be secured to them as hereinafter provided.
>
> SEC. 2. That it shall be the duty of said commissioners to select a reservation for each band or village of the Mission Indians residing within said State, which reservation shall include, as far as practicable, the lands and villages which have been in the actual occupation and possession of said Indians, and which shall be sufficient in extent to meet their just requirements, which selection shall be valid when approved by the President and Secretary of the Interior. They shall also appraise the value of the improvements belonging to any person to whom valid existing rights have attached under the public-land laws of the United States, or to the assignee of such person, where such improvements are situated within the limits of any reservation selected and defined by said commissioners subject in each case to the approval of the Secretary of the Interior. In cases where

the Indians are in occupation of lands within the limits of confirmed private grants, the commissioners shall determine and define the boundaries of such lands, and shall ascertain whether there are vacant public lands in the vicinity to which they may be removed. And the said commission is hereby authorized to employ a competent surveyor ~~and the necessary~~ assistants.

SEC. 3. That the commissioners, upon the completion of their duties, shall report the result to the Secretary of the Interior, who, if no valid objection exists, shall cause a patent to issue for each of the reservations selected by the commission and approved by him in favor of each band or village of Indians occupying any such reservation, which patents shall be of the legal effect, and declare that the United States does and will hold the land thus patented, subject to the provisions of section four of this act, for the period of twenty-five years, in trust, for the sole use and benefit of the band or village to which it is issued, and that at the expiration of said period the United States will convey the same or the remaining portion not previously patented in severalty by patent to said band or village, discharged of said trust, and free of all charge or incumbrance whatsoever: *Provided,* That no patent shall embrace any tract or tracts to which existing valid rights have attached in favor of any person under any of the United States laws providing for the disposition of the public domain, unless such person shall acquiesce in and accept the appraisal provided for in the preceding section in all respects and shall thereafter, upon demand and payment of said appraised value, execute a release of all title and claim

thereto; and a separate patent, in similar form, may be issued for any such tract or tracts, at any time thereafter. Any such person shall be permitted to exercise the same right to take land under the public-land laws of the United States as though he had not made settlement on the lands embraced in said reservation; and a separate patent, in similar form, may be issued for any tract or tracts at any time after the appraised value of the improvements thereon shall have been paid: *And provided further,* That in case any land shall be selected under this act to which any railroad company is or shall hereafter be entitled to receive a patent, such railroad company shall, upon releasing all claim and title thereto, and on the approval of the President and Secretary of the Interior, be allowed to select an equal quantity of other land of like value in lieu thereof, at such place as the Secretary of the Interior shall determine: *And provided further,* That said patents declaring such lands to be held in trust as aforesaid shall be retained and kept in the Interior Department, and certified copies of the same shall be forwarded to and kept at the agency by the agent having charge of the Indians for whom such lands are to be held in trust, and said copies shall be open to inspection at such agency.

SEC. 4. That whenever any of the Indians residing upon any reservation patented under the provisions of this act shall, in the opinion of the Secretary of the Interior, be so advanced in civilization as to be capable of owning and managing land in severalty, the Secretary of the Interior may cause allotments to be made to such Indians.

out of the land of such reservation, in quantity as follows: To each head of a family not more than six hundred and forty acres nor less than one hundred and sixty acres of pasture or grazing land, and in addition thereto not exceeding twenty acres, as he shall deem for the best interest of the allottee, of arable land in some suitable locality; to each single person over twenty-one years of age not less than eighty nor more than six hundred and forty acres of pasture or grazing land and not exceeding ten acres of such arable land.

SEC. 5. That upon the approval of the allotments provided for in the preceding section by the Secretary of the Interior he shall cause patents to issue therefor in the name of the allottees, which shall be of the legal effect and declare that the United States does and will hold the land thus allotted for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs according to the laws of the State of California, and that at the expiration of said period the United States will convey the same by patent to the said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever. And if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same, before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void: *Provided*, That these patents, when issued, shall override the patent authorized to be issued to the band or village as aforesaid, and shall separate the individ-

ual allotment from the lands held in common, which proviso shall be incorporated in each of the village patents.

SEC. 6. That in cases where the lands occupied by any band or village of Indians are wholly or in part within the limits of any confirmed private grant or grants, it shall be the duty of the Attorney-General of the United States, upon request of the Secretary of the Interior, through special counsel or otherwise, to defend such Indians in the rights secured to them in the original grants from the Mexican Government, and in an act for the government and protection of Indians, passed by the legislature of the State of California April twenty-second, eighteen hundred and fifty, or to bring any suit, in the name of the United States, in the Circuit Court of the United States for California, that may be found necessary to the full protection of the legal or equitable rights of any Indian or tribe of Indians in any of such lands.

SEC. 7. That each of the commissioners authorized to be appointed by the first section of this act shall be paid at the rate of eight dollars per day for the time he is actually and necessarily employed in the discharge of his duties, and necessary traveling expenses; and for the payment of the same, and of the expenses of surveying, the sum of ten thousand dollars, or so much thereof as may be necessary, is hereby appropriated out of any money in the Treasury not otherwise appropriated.

SEC. 8. That previous to the issuance of a patent for any reservation as provided in section three of this act the Secretary of the Interior may authorize any citizen of the United States, firm, or corporation to

construct a flume, ditch, canal, pipe, or other appliances for the conveyance of water over, across, or through such reservation for agricultural, manufacturing, or other purposes, upon condition that the Indians owning or occupying such reservation or reservations shall, at all times during such ownership or occupation, be supplied with sufficient quantity of water for irrigating and domestic purposes upon such terms as shall be prescribed in writing by the Secretary of the Interior, and upon such other terms as he may prescribe, and may grant a right-of-way for rail or other roads through such reservation: *Provided,* That any individual, firm, or corporation desiring such privilege shall first give bond to the United States, in such sum as may be required by the Secretary of the Interior, with good and sufficient sureties, for the performance of such conditions and stipulations as said Secretary may require as a condition precedent to the granting of such authority: *And provided further,* That this act shall not authorize the Secretary of the Interior to grant a right-of-way to any railroad company through any reservation for a longer distance than ten miles. And any patent issued for any reservation upon which such privilege has been granted, or for any allotment therein, shall be subject to such privilege, right-of-way, or easement. Subsequent to the issuance of any tribal patent, or of any individual trust patent as provided in section five of this act, any citizen of the United States, firm, or corporation may contract with the tribe, band, or individual for whose use and benefit any lands are held in trust by the United States, for the right to construct a flume, ditch,

canal, pipe, or other appliances for the conveyance of water over, across, or through such lands, which contract shall not be valid unless approved by the Secretary of the Interior under such conditions as he may see fit to impose.

2. The pertinent provision of the Act of March 2, 1917, 39 Stat. 969, 976, is as follows:

> That section three of the Act of January twelfth, eighteen hundred and ninety-one (Twenty-sixth Statutes at Large, page seven hundred and twelve), entitled "An Act for the relief of Mission Indians in the State of California," be, and the same is hereby, amended so as to authorize the President, in his discretion and whenever he shall deem it for the interests of the Indians affected thereby, to extend the trust period for such time as may be advisable on the land held in trust for the use and benefit of the Mission Bands or villages of Indians in California: *Provided*, That the Secretary of the Interior be, and he is hereby, authorized and directed to cause allotments to be made to the Indians belonging to and having tribal rights on the Mission Indian reservations in the State of California, in areas as provided in section seventeen of the Act of June twenty-fifth, nineteen hundred and ten (Thirty-sixth Statutes at Large, page eight hundred and fifty-nine), instead of as provided in section four of the Act of January twelfth, eighteen hundred and ninety-one (Twenty-sixth Statutes at Large, page seven hundred and thirteen): *Provided*, That this act shall not affect any allotments heretofore patented to these Indians.

3. The Act of August 15, 1894, 28 Stat. 286, 305, as amended, 25 U. S. C. sec. 345, is as follows:

> All persons who are in whole or in part of Indian blood or descent who are entitled to an allotment of land under any law of Congress, or who claim to be so entitled to land under any allotment Act or under any grant made by Congress, or who claim to have been unlawfully denied or excluded from any allotment or any parcel of land to which they claim to be lawfully entitled by virtue of any Act of Congress, may commence and prosecute or defend any action, suit, or proceeding in relation to their right thereto in the proper district court of the United States; and said district courts are given jurisdiction to try and determine any action, suit, or proceeding arising within their respective jurisdiction involving the right of any person, in whole or in part of Indian blood or descent, to any allotment of land under any law or treaty (and in said suit the parties thereto shall be claimant as plaintiff and the United States as party defendant); and the judgment or decree of any such court in favor of any claimant to an allotment of land shall have the same effect, when properly certified to the Secretary of the Interior, as if such allotment had been allowed and approved by him, but this provision shall not apply to any lands held August 15, 1894, by either of the Five Civilized Tribes, nor to any of the lands within the Quapaw Indian Agency: *Provided*, That the right of appeal shall be allowed to either party as in other cases.

4. The pertinent provisions of the General Allotment Act, as amended, 25 U. S. C. secs. 331-333, follow:

§ 331. Allotments on reservations; irrigable and nonirrigable lands.

In all cases where any tribe or band of Indians has been or shall be located upon any reservation created for their use by treaty stipulation, Act of Congress, or Executive order, the President shall be authorized to cause the same or any part thereof to be surveyed or resurveyed whenever in his opinion such reservation or any part may be advantageously utilized for agricultural or grazing purposes by such Indians, and to cause allotment to each Indian located thereon to be made in such areas as in his opinion may be for their best interest not to exceed eighty acres of agricultural or one hundred and sixty acres of grazing land to any one Indian. And whenever it shall appear to the President that lands on any Indian reservation subject to allotment by authority of law have been or may be brought within any irrigation project, he may cause allotments of such irrigable lands to be made to the Indians entitled thereto in such areas as may be for their best interest, not to exceed, however, forty acres to any one Indian, and such irrigable land shall be held to be equal in quantity to twice the number of acres of nonirrigable agricultural land and four times the number of acres of nonirrigable grazing land: *Provided,* That the remaining area to which any Indian may be entitled under existing law after he shall have received his proportion of irrigable land on the basis of equalization herein established may be allotted to him from nonirrigable agricultural or grazing lands: *Provided further,* That where a treaty or Act of Congress setting apart such reservation provides for allot-

ments in severalty in quantity greater or less than that herein authorized, the President shall cause allotments on such reservations to be made in quantity as specified in such treaty or Act, subject, however, to the basis of equalization between irrigable and nonirrigable lands established herein, but in such cases allotments may be made in quantity as specified herein, with the consent of the Indians expressed in such manner as the President in his discretion may require.

§ 332. Selection of allotments.

All allotments set apart under the provisions of sections 331–333 of this title shall be selected by the Indians, heads of families selecting for their minor children, and the agents shall select for each orphan child, and in such manner as to embrace the improvements of the Indians making the selection. Where the improvements of two or more Indians have been made on the same legal subdivision of land, unless they shall otherwise agree, a provisional line may be run dividing said lands between them, and the amount to which each is entitled shall be equalized in the assignment of the remainder of the land to which they are entitled under said sections: *Provided,* That if any one entitled to an allotment shall fail to make a selection within four years after the President shall direct that allotments may be made on a particular reservation, the Secretary of the Interior may direct the agent of such tribe or band, if such there be, and if there be no agent, then a special agent appointed for that purpose, to make a selection for such Indian, which selection shall be allotted as in cases where selections are made

by the Indians, and patents shall issue in like manner.

§ 333. Making of allotments by agents.

The allotments provided for in sections 331–333 of this title, shall be made by special agents appointed by the President for such purpose, and the superintendents or agents in charge of the respective reservations on which the allotments are directed to be made, or, in the discretion of the Secretary of the Interior, such allotments may be made by the superintendent or agent in charge of such reservation, under such rules and regulations as the Secretary of the Interior may from time to time prescribe, and shall be certified by such special allotting agents, superintendents, or agents to the Commissioner of Indian Affairs, in duplicate, one copy to be retained in the Indian Office and the other to be transmitted to the Secretary of the Interior for his action, and to be deposited in the General Land Office.

5. Letter from the Secretary of the Interior to the Chairman of the Senate Committee on Indian Affairs, having relation to the Act of March 2, 1917:

JAN. 7, 1916.

Hon. HENRY F. ASHURST,
Chairman,
Committee on Indian Affairs,
United States Senate.

My dear Senator: I transmit herewith the draft of a bill to authorize allotments to members of the Mission Indian bands in California, under authority of section 17 of the act of June 25, 1910 (36 Stat. L., 855-859). In the Department's letter of March 21, 1912, to the former Chairman

of the Senate Indian Committee, the necessity was given in detail of allotting the Morongo Mission band under the provisions of the general allotment act of February 8, 1887 (24 Stat. L., 388), as amended by the act of June 25, 1910, supra, rather than under the act of January 12, 1891 (26 Stat. L., 712–713). The matter was again presented to the Congress by letter of December 13, 1913. This proposed legislation has been favorably reported upon by the House Committee on Indian Affairs (See Report No. 397 to accompany H. R. 10505, 63rd Congress, 2d Session).

There has been no material change in conditions on the reservation since the prior requests of the Department for authority to allot the Morongo band under the terms of the act of June 25, 1910. Reports have been received from various field officers of the Indian Service, who have investigated conditions on the reservation, which indicate that these Indians greatly desire the identification of their individual land interests, and that they have reached the status where they would be benefited by the allotment of their reservation in severalty.

The act of January 12, 1891, supra, authorizes allotments to heads of families and single persons over 21 years of age, and makes no provision for married women, or for single persons under 21 years of age, whereas under the provisions of section 17 of the act of June 25, 1910, a pro rata division may be made of the land suitable for allotment purposes. The act of February 8, 1887 (24 Stat. L., 388), made no provision for married women, and many cases have come to the notice of the Department of divorces or desertions which

left unprovided with land married women who were supposed to share equally with the head of the family when the allotments were made. This condition was cured in subsequent allotments by the amending act of February 28, 1891 (26 Stat. L., 794), which authorized allotments to each Indian, in equal area, without considering their age or marital status. This act was further amended by section 17 of the act of June 25, 1910, supra, which provides for allotments in areas of 40 acres of irrigable land, or 80 acres of nonirrigable agricultural land, or 160 acres of nonirrigable grazing land. There is on the Morongo Reservation sufficient land to allot each Indian entitled, about five acres of irrigable land with a reasonable amount of grazing land, and the Department is of the opinion that it would be the wiser and better plan to make a pro rata division of the land of these Indians rather than to attempt to allot under the act of January 12, 1891.

In many instances the more influential members of the band have cultivated larger tracts than they would be entitled to receive as allotments, and have prevented the more timid ones from establishing a permanent home on the reservation by their own individual labor. This is a condition that can not be cured entirely until the lands have been allotted in severalty. Again, many of the members who might cultivate and improve lands do not feel justified in expending their labor and their small earnings in plowing and planting and building unless they are fully assured that they will receive the improved tract as an allotment. The Department believes that the present conditions, while much better than they were some years ago, would be rapidly im-

proved by allotment in severalty, provided authority to pro rate the available land is given.

What has been said with regard to allotting the Morongo band under section 17 of the act of June 25, 1910, supra, applies with equal force to the other Mission bands that have been patented lands under the acts of January 12, 1891, and March 1, 1907, supra. The proposed bill has therefore been made applicable to all of these Indians rather than to the Morongo band specifically. A list showing the Mission bands, number of Indians, and area of patented lands is enclosed.

It may be well to mention the act of May 27, 1902 (32 Stat. L., 245–257), which authorized the purchase of lands for the Warners Ranch Indians, now known as the Pala band, and allotments to these Indians under the terms of the general allotment act of February 8, 1887 (24 Stat. L., 388). These lands were practically pro rated among the Indians entitled, by the allotment of small areas of good irrigable land with the addition of a small quantity of grazing land. Reports show a general improvement in the condition of this particular band of Mission Indians and a lively interest in cultivating and improving their patented land, as they are now assured of the particular tracts on which they may establish permanent homes.

The Department would be pleased to see the legislation, as now proposed, enacted into law.

Cordially yours,

(Sgd.) FRANKLIN K. LANE.

11–JM–29.
Encl. 14529.

A BILL Authorizing the Secretary of the Interior to cause allotments to be made on Mission Indian Reservations in California

BE IT ENACTED BY THE SENATE AND THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED, That the Secretary of the Interior, be, and he is hereby, authorized and directed to cause allotments to be made to the Indians belonging to and having tribal rights on the Mission Indian Reservations in the State of California, in areas as provided in section seventeen of the act of June twenty-fifth, nineteen hundred and ten (Thirty-sixth Statutes at Large, page eight hundred and fifty-nine), instead of as provided in section four of the act of January twelfth, eighteen hundred and ninety-one Twenty-sixth Statutes at Large, page seven hundred and thirteen): Provided, That this act shall not affect any allotments heretofore patented to these Indians.

6. Instructions from the Secretary of the Interior to Wadsworth as regards the making of allotments:

Land-Allot

94531-20
T D M

JAN. 26, 1922.

Mr. Harry E. Wadsworth,
Special Alloting Agent,
Therman, California.

Dear Mr. Wadsworth; Your attention is again invited to the correspondence relative to the allotting of a portion of the lands of the Torres-Martinez Indian Reservation.

This will advise you that the Tribal Roll, recently prepared and forwarded to the Office by you, has been accepted as correct

and will constitute the basis for assigning the allotments. It is noted that there were 213 persons eligible to receive allotments at the date on which that roll was completed. It is also observed from the Classification Schedule, submitted with your report of June 27, 1921 that there are within the Torres-Martinez Reservation approximately 11,000 acres of land, classified as irrigable, in addition to that not susceptible of irrigation.

It is evident, from the above data, that there is land available for allotting each enrolled Indian 40 acres of the land classified as irrigable, and it has been decided to take action along that line. You are directed, therefore, to begin the allotting of said Torres-Martinez lands as soon as your present assignment has been completed, which you have stated would be about February 1, 1922.

The land involved has already been surveyed into townships and sections and the survey accepted by the General Land Office. You are instructed to assign the allotments in tracts of approximately 40 acres each of irrigable lands only. It is very important that the allotment selections be described in legal sub-divisions and made to conform to the public survey. If, however, in some instances it seems necessary to approve selections that do not conform to the survey, such cases should first be referred to the Office, with rough plats and other data showing the conditions obtaining, and you will receive instructions as to the advisability of listing such selections on the schedules. It is assumed that you have satisfactory plats and maps of the territory to be allotted, in your possession, or available for consultation.

No allotment selection should be permitted on any land other than that classified as irrigable, since it is contemplated to encourage the placing of each allotment, or at least a portion thereof, under irrigation as soon as possible. The lands classified as not susceptible of irrigation will remain in the tribal status pending future disposition.

The allotments herein authorized will be made under the provisions of the Act of Congress of February 8, 1887 (24 Stat. L., 388), as amended by the Act of June 25, 1910 (36 Stat. L., 855), and supplemented by the Act of March 2, 1917 (39 Stat. L., 969–76). The allotment selections should be listed, as made and reported, and Certificates issued therefor on Form 5-201. Care should be exercised in that connection to issue the Certificates only in cases where you are satisfied that the person for whom the land is selected is living. The names of those Indians who shall have died since the roll was prepared should be disregarded, and on the other hand, the names of children born, to duly enrolled members, may be added to the roll and may be allotted up to such date as you may set for the completion of the allotment schedules.

Each Indian who has reached the age of discretion should be permitted to select his own allotment, but the selections for minors may be made by the parents, if living, or by some other person whom you regard as competent to do so. Selections for orphans should be made by you.

If any Indian has acquired an equitable right to a specific tract of land by reason of occupancy, improvement, and use, such right should be recognized and protected as fully as possible by permitting him, or

members of his family, to select such land. Each allotment selection should be marked in a definite manner with corner posts, and the same should be pointed out to the allottees whenever it is practicable.

The allotment schedules should be made in triplicate, on Form 5–176. On each schedule should be placed the allotment number, the name of the allottee, relationship, sex, age, and the description of the land as indicated by the column headings. You should allow not less than three lines between the allotment descriptions, to provide for available space that may be needed in the future to enter new descriptions if modifications should be necessary. On the last page of each copy of the schedules should be placed a certificate showing the date on which the listing of allotment selections began, also the date on which said work closed, together with a statement to the effect that the allotments shown thereon were made in accordance with the provisions of the Acts of Congress herein before cited, and said certificate should be dated and duly signed by you. When completed the original and duplicate copies of the schedules should be transmitted to the Office and the triplicate copy placed in the Agency files.

All allotment selections should be reproduced graphically on tracing cloth township plats (Form 5–177a), and the name of each allottee, and the allotment number, should be shown on the diagram. Only one copy of said plats should be prepared, which copy should be forwarded to the Office with the schedules.

Monthly reports in duplicate showing the status of the work should be submitted to the Office on Form 5–250, within ten

days after the expiration of the month. All doubtful questions which may arise should be referred to the Office and specific instructions will be given for your guidance. The necessary forms for use in the work are being sent to you under separate cover, and your request for any additional supplies found necessary may be made on Form 5–262.

Sincerely yours,

/S/ Chas. H. Burke, Commissioner.

Approved: Jan. 26, 1922.

(Sgd.) F. M. Goodwin,
Assistant Secretary.

Copy to: Northern Mission Agency.
1–26–20.

7. Superintendent Ellis' letter to Commissioner of Indian Affairs, in regard to opposition among the Palm Springs Band of Indians to allotments:

85 684–23

DEPARTMENT OF THE INTERIOR

UNITED STATES INDIAN FIELD SERVICE,
MISSION INDIAN AGENCY,
Riverside, Calif., Nov. 26, 1923.

Hon. Chas. H. Burke,
Commissioner of Indian Affairs,
Washington, D. C.

My dear Mr. Commissioner: Replying to your letters of the 6th instant and subsequent dates regarding petitions against allotments received from 28 bands of Mission Indians, I have made particular inquiry and do not believe there is any connection between the petition secured by Messrs. Collier and Berle at Palm Springs, and the petitions from the other reservations. All the five petitions sent me and I suppose the others (except the Palm

Springs petition) were worded alike and were prepared during the recent semi-annual meeting of the Mission Indian Federation held at Joanthan Tibbets place in Riverside, and distributed through attending representatives from all the Mission reservations. These meetings have been held at regular intervals for last four years and they have opposed allotting from the beginning and persistently have adopted resolutions and sent protests to officials in Washington, Members of Congress and other prominent persons asking that the allotting be prevented. Attached to my letter of November 1st is newspaper clipping of resolutions adopted at last meeting of the federation in which allotting is again opposed.

Shortly after my meeting with Dr. Comstock and the Agua Caliente Indians at Palm Springs, Mr. Collier and a "big heavy man" (Mr. Berle) met the Indians at the Palm Springs bath house. Mr. Collier did most of the talking to the Indians and is reported to have told the Indians that he would try to stop the allotting if they would give their reasons for opposing same and sign a petition he presented. The Indians told him that no one had explained the allotting to them and complained that land and improvements were taken from some Indians to give to others. Mr. Collier is said to have told the Indians that if they were allotted, they would be made citizens, receive patents in fee and thus lose their land. This last assertion is borne out by inclosed newspaper clipping of an article released November 9th by Mr. Collier's American Indian Defense Association of New York City. The Indians were deceiving Messrs. Collier and Berle when they

were told that the allotting had not been explained to the Indians. See my letters to your Office dated May 16 and 25th and Office letters Land-Allot. 35474–5, dated May 4th.

Most of the Palm Springs (Agua Caliente) Indians have opposed allotting from the beginning. They protested through the Mission Indian Federation in May and to members of Congress, the Secretary of the Interior, Senator Borah, Mr. Wm. J. Bryan, Jr. and others of his Los Angeles Indian Welfare League, and three of the Indians appeared at the meeting of the League of the Southwest held last July at Santa Barbara to voice their protests. I don't think any one induced them to protest and believe they would oppose allotting even if Miss Green and Mr. Collier and others of his association had not taken a hand. Two members of Mr. Collier's Defense League at Santa Barbara, a Mr. Hoffman and a Mr. Franklin Price Knott, were at Palm Springs when Dr. Comstock and I held our meeting with the Indians. Mr. Knott remarked that he took up a collection of $200.00 at Santa Barbara to defray cost of the map sent to Mr. Collier. The Santa Barbara men seemed to be strangers to Dr. Comstock.

Dr. Comstock's attitude is favorable to allotments, and he so expressed himself to Mr. H. E. Wadsworth, the Allotting Agent, upon a recent visit to him in Los Angeles.

The five petitions sent me are being returned with separate reports.

Attached is copy of a letter dated Sept. 11th from Rev. Wm. H. Weinland to Miss Elizabeth Green in answer to her pamphlet published by Miss Hathaway about allotting and proposed national monument at

Palm Springs. Mr. Weinland's 32 years' residence among the Mission Indians gives his statements authority and he emphasizes the fact that individual allotments encourages improvements and progress as opposed to the reactionary communistic form of tribal holding of property which the old leaders of the bands wish to preserve and thus keep themselves in authority.

Sincerely yours,

(signed) C. L. Ellis, Superintendent.

2 incls.

8. Commissioner Burke's letter to the Secretary of the Interior, in regard to opposition among the Palm Springs Band to allotment:

UNITED STATES
DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
Washington, Dec. 22, 1926.

The Honorable The Secretary of the Interior.

SIR: The question of allotments of land to the Indians of the Mission reservations in southern California has received careful consideration, and there are submitted herewith my conclusions and recommendations as to the policy I believe should be pursued relative to this matter.

For some time past there has been brought to our attention newspaper articles and other forms of criticism of our treatment of these Indians, and some of these while undoubtedly based upon lack of information or upon misinformation, are especially bitter with respect to the alleged plan of alloting the Indians small tracts of doubtful quality. Certain Indians have also protested against allotments of any size

or character, and some of their white friends have magnified this opposition.

At the present time there are five schedules of allotments pending in this Office embracing lands on the Palm Springs, Augustine, Cabazon, LaJolla and Rincon Reservations, and reports are on file made by Inspector Blair, Superintendent Ellis, and Allotting Agent Wadsworth, containing reasons for approval, in whole or in part, of these schedules. Very recently Assistant Commissioner Meritt telegraphed from Riverside, California, with respect to Mission allotments that "allotments should be made to Mission Indians who desire them but not to objectors." Mr. Meritt assures me that in his opinion this plan if carried out will meet the approval of a majority of persons in California who are interested in this subject, including many of the Indians concerned.

There is ample authority of law for making allotments to the Mission Indians, and some of the reservations have already been allotted, including the Morongo, Pala, Sycuan, Temecula, and Torres-Martinez. From the best information available the Indians of these reservations are progressing and appear to be well satisfied with conditions.

It is my opinion that if we should proceed to allot the Indians on the other Mission reservations *who desire allotments*, and for which each allottee would receive a trust patent, it would be for their best interests, and improved conditions would follow naturally. Moreover I believe that if this were done, other Indians who are now classed as objectors, and those who oppose allotments of any character, would soon fall

in line and request that they too be given their proportionate share of the allottable areas.

Twenty-five year trust patents were issued to the various Mission bands pursuant to the Act of January 12, 1891 (26 Stat. 712), which Act also authorized allotments to individual Indians, the patents in such cases to supercede the outstanding patents issued in the names of various bands. The Act of March 2, 1917 (39 Stat. 969–976), amended the Act of January 12, 1891, supra, with respect to the method of allotment as to areas, and authorized the President in his discretion to extend the trust period for such time as might be advisable. These Indians are not capable of managing their own affairs without Government supervision, as a tribe or band or as individuals, except perhaps in isolated cases, and it is my belief that the President should be asked to extend the period of trust whenever occasion requires.

It is, therefore, recommended that this Office be authorized to revise the schedules now pending so as to eliminate the names and selections of those Indians who do not desire allotments at this time, and as revised to present the schedules for Departmental consideration with a view to approval and the issuance of trust patents as authorized by law. To accomplish this it is proposed to obtain the written consent of each Indian who desires to receive an allotment on the particular reservation of which he is a member. It is also recommended that we be authorized to instruct the allotting agent to proceed with the allotment work on the unallotted Mission

reservations so as to give each Indian a tract of not less than five acres of irrigable land if available, or such other suitable tract as the Indians may wish to select and improve as his permanent home. It is also recommended that we be authorized to present for Departmental approval a supplemental schedule now pending containing 27 selections on the Torres-Martinez Reservation. These selections were formerly listed on the regular allotment schedule for the Torres-Martinez Reservation, which was approved October 27, 1922. These selections, however, were excepted from approval at that time for the reason that it was deemed advisable to have certain wells, which are located thereon, segregated and eliminated from the allotments. The wells were constructed by the Government and are now operated for the benefit of the Indians of that reservation generally.

If these recommendations are approved the Superintendent and the Allotting Agent will be promptly advised and instructed, and such other action will be taken as may be necessary to carry out the plan herein proposed.

Respectfully,

(s) Chas. H. Burke,
Commissioner.

Approved: JAN. 5, 1927.

(s) Hubert Work,
Secretary.

9. Assistant Commissioner Meritt's letter to Wadsworth, in regard to opposition among the Palm Springs Band of Indians to allotment:

73390

Land-Allot
252–23
H V C

JAN. 8, 1927.

Mr. H. E. Wadsworth,
Special Allotting Agent.

My dear Mr. Wadsworth: There is inclosed copy of Office letter dated December 22, 1926, approved by the Department January 5, 1927, outlining the policy to be pursued with reference to the allotments on the Mission reservations in southern California, and particularly with respect to certain schedules now pending in this Office.

You will observe that it is proposed to obtain the written consent of every Indian who desires to receive an allotment on the particular reservation of which he is a member. This plan necessarily involves a revising of the pending schedules, or the making of entirely new schedules. As it may be necessary to make numerous changes and probably in some cases add new selections for Indians not now enumerated, and in view of the fact that the certificate of yourself and the Superintendent on the pending schedules will also need modification or change, it is believed advisable to adopt the plan of making entirely new schedules.

All of the pending schedules and the tracings of township plats submitted in each case are being sent to you under separate cover in care of the Mission Agency at Riverside. As soon as convenient after receipt of these instructions and allowing sufficient time for the arrival of the schedules at Riverside, you will proceed there for examination of the papers and

for conference with the officer in charge. Thereafter you will please obtain if possible, from each Indian whose name is enumerated on the pending schedules, his written consent to receive an allotment on the particular reservation of which he is a member, or have such written consent signed by some one entitled to represent the allottee. Commencing with the Rincon Reservation you will prepare a new schedule for each reservation, on which you will place the selections of all Indians entitled to allotments and who have given their written consent. It is not important whether the written consent in such cases be prepared separately or in the form of a petition properly worded to answer the purpose. In either case it should be prepared in duplicate, and the original forwarded to this Office with the schedule.

As the allotment work on the mission reservations has been suspended for a considerable period, now that a definite plan of procedure has been decided upon it is desirable to adjust the pending schedules at the earliest date possible, so that the Indians who are ready for allotments may receive trust patents for the lands selected by them. You are therefore requested to give this matter your immediate and continuous attention, and forward to this Office as soon as may be new schedules in duplicate in lieu of those to be returned to you, which are enumerated as follows with the number of selections in each case:

> Augustine, 16; Palm Springs, 50; Cabazon, 29; Rincon, 123; LaJolla, 114; Mission Creek, 21.

A copy of this letter and a copy of the inclosure will be sent to the Mission Agency,

and the officer in charge is hereby requested to give you all possible assistance to expedite your work under these instructions, and as each new schedule is completed he is authorized to join with you in the usual certificate.

Sincerely yours,

(signed) B. B. Meritt,
Assistant Commissioner.

(Copy to Mission.)

10. Superintendent Ellis' letter to the Commissioner of Indian Affairs in regard to the increase in value of the lands selected for allotment:

District Superintendency No. 6

UNITED STATES
DEPARTMENT OF THE INTERIOR,
INDIAN FIELD SERVICE,
Muskogee, Oklahoma, August 2, 1928.

The Honorable,
Commissioner of Indian Affairs.

My dear Mr. Commissioner: I am in receipt of your letter of July 24th, and under separate cover a duplicate schedule of allotment selections for Indians of Palm Springs (Ague Caliente) Indian Reservation, California, submitted under date of May 9, 1927 by Mr. H. E. Wadsworth, Special Allotting Agent.

Reference is made in your letter to enclosed copy of a recent communication from Mr. Wadsworth dated June 10, 1928, to which is attached copy of Office letter to him dated April 24, 1928, and copy of a proposed letter to the Department recommending approval of this schedule with certain exceptions. I am directed to consider the essential details and append such endorsement on both copies of the schedule

as may be consistent with my views regarding the selections or parts of selections which I think should be suspended.

I am returning the schedules herewith in order that I may join Mr. Wadsworth in the same certificate by having the schedule copied, omitting selections Nos. 16, 18, 19, 20 and 21, allotted respectively to Richard Amado Miguel, Genevieve Pierce St. Marie, Ruth Florilla St. Marie, Carrie Pierce Casero and Anna J. Pierce.

The above correspondence is in error in stating that selection No. 22 was recommended for suspension; it should have been No. 21. These five selections each contain, as has been set out in previous reports, 40 acres of desert land which is exceedingly valuable for townsite purposes, being adjacent to the rapidly growing winter resort of Palm Springs which is becoming the most popular winter resort of California and attracting many people of great wealth who are building expensive winter homes there. Besides residences, there are several large hotels, two of which have invested a $1,000,000 or more each.

I trust your Office will acquiesce in my views that these five allotments should be eliminated from this schedule as suggested above. This will require no work except that taken in doing the typewriting. At a later date the above allottees, when they decide to take other selections, can have their selections resubmitted in another schedule.

Respectfully,

(Sgd.) C. L. Ellis,
District Superintendent.

U. S. GOVERNMENT PRINTING OFFICE 1944

SUPREME COURT OF THE UNITED STATES.

No. 463.—October Term, 1943.

Lee Arenas, Petitioner,
vs.
The United States of America.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[May 22, 1944.]

Mr. Justice Jackson delivered the opinion of the Court.

The petitioner Arenas is a full-blood Mission Indian, regularly enrolled in the Agua Caliente or Palm Springs Band. He sued in the United States District Court to be awarded a trust patent to certain lands on the Palm Springs reservation. The Government was granted a summary judgment of dismissal on affidavits and on the record of the *St. Marie* litigation on like claims by similarly situated Indians.[1] No findings have been made in this case by the District Court. The Circuit Court of Appeals affirmed,[2] chiefly in reliance upon its previous decision in the *St. Marie* case, and we granted certiorari.[3]

For a long period Congress pursued the policy of imposing, as rapidly as possible, our system of individual land tenure on the Indian. To this end tribal or communal land holdings of the Indians were superseded by allotment to individuals, who were protected against improvidence by restraints on alienation.[4] The Mission Indians had deserved well and had fared badly[5] and Congress passed the Mission Indian Act of 1891[6] for their particular redress.

The first three sections of this Act set up a commission to settle these several bands on suitable reservations and directed that any

[1] St. Marie v. United States, 24 F. Supp. 237, 108 F. 2d 876, cert. denied because petition out of time, 311 U. S. 652.

[2] 137 F. 2d 199.

[3] — U. S. —.

[4] General Allotment Act of 1887, 24 Stat. 388, 25 U. S. C. § 331; see Cohen, Handbook of Federal Indian Law, c. 11.

[5] See report on conditions and needs of the Mission Indians, Sen. Rep. No. 74, 50th Cong., 1st Sess.

[6] 26 Stat. 712.

propriate patents issue. The United States was to hold the titles in trust, however, for twenty-five years and then was to convey to the tribes any portions not previously patented in severalty to members. Several reservations were set apart, including one at Palm Springs, with which this and the *St. Marie* case were concerned.

The Act also provided in § 4 that whenever in the opinion of the Secretary of the Interior any of the Indians should "be so advanced in civilization as to be capable of owning and managing land in severalty, the Secretary of the Interior may cause allotments to be made to such Indians, out of the land of such reservation" and if specified the acreage to be allotted to each. Section 5 provided that on approval of the allotments the Secretary should cause patents to issue in the name of the allottees. For twenty-five years the lands were to remain in trust for their benefit and then were to be conveyed in fee free of the trust.[7]

Nevertheless, little was done toward allotment in severalty to Mission Indians for nearly twenty-five years. One reason, we gather, was that the Act authorized allotment on a more liberal basis than available lands would permit, although there may have

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[7] §§ 4 and 5 of the Act provide as follows:

"Sec. 4. That whenever any of the Indians residing upon any reservation patented under the provisions of this act shall, in the opinion of the Secretary of the Interior, be so advanced in civilization as to be capable of owning and managing land in severalty, the Secretary of the Interior may cause allotments to be made to such Indians, out of the land of such reservation, in quantity as follows: To each head of a family not more than six hundred and forty acres nor less than one hundred and sixty acres of pasture or grazing land, and in addition thereto not exceeding twenty acres, as he shall deem for the best interest of the allottee, of arable land in some suitable locality; to each single person over twenty-one years of age not less than eighty nor more than six hundred and forty acres of pasture or grazing land and not exceeding ten acres of such arable land.

"Sec. 5. That upon the approval of the allotments provided for in the preceding section by the Secretary of the Interior he shall cause patents to issue therefore in the name of the allottees, which shall be of the legal effect and declare that the United States does and will hold the land thus allotted for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs according to the laws of the State of California, and that at the expiration of said period the United States will convey the same by patent to the said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever. And if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same, before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void: *Provided*, That these patents, when issued, shall override the patent authorized to be issued to the band or village as aforesaid, and shall separate the individual allotment from the lands held in common, which proviso shall be incorporated in each of the village patents."

been other reasons. In 1916, however, Secretary Lane called the neglect to the attention of Congress and asked that he be authorized to make allotments in quantities governed by the General Allotment Act of 1887 as amended by section 17 of the Act of June 25, 1910, 36 Stat. 859, instead of in those set out in the Mission Indian Act of 1891. Thereupon Congress passed the Act of March 2, 1917[8] by which it "authorized and directed" the Secretary to proceed under the Act of 1910.

The Secretary on June 7, 1921 appointed Harry E. Wadsworth as Special Allotting Agent at Large for the Mission Indian Reservations of California and instructed him to prepare schedules of selections for allotments thereon. In 1923, Wadsworth filed a schedule showing selections on the Palm Springs Reservation for fifty members of the Band. The Secretary expressly disapproved this schedule. Complaint had come from the Indians, many of whom did not want allotments and had not made the selections listed in their names. When they failed to choose, the allotment agent had made a choice for them. The Secretary instructed Wadsworth to prepare a new schedule listing only selections voluntarily made and to leave off those who did not desire allotments. In 1927, the Department received from Wadsworth a new schedule showing voluntary selections for twenty-four members of the Palm Springs Band.

Each Indian for whom a selection was listed received from Wadsworth a certificate of selection for allotment. Each was stamped "Not valid unless approved by the Secretary of the Interior."

On October 26, 1923, Wadsworth asked the Indian Department for instructions, reciting, "Allotments being completed and certificates issued. Many allottees anxious to immediately occupy their selections and prepare things for early crops instead waiting for receipt of patents." On the same day he received reply, "No objection to Indians preparing their respective allotment selections for crops if properly listed on schedule." Wadsworth also wrote to one, at least, of the allottees in the *St. Marie* case, saying among other things, "It is difficult to tell exactly when you may expect these patents from Washington but I believe they should be here within 6 weeks or so. They will come to the

[8] 39 Stat. 969, 976.

superintendent in Riverside, who will notify you that they are there and ready for delivery to you. In the meantime, the Commissioner of Indian Affairs in Washington authorizes me to say to you that from this date you are entitled to enter upon and take possession of these allotments, and these certificates will be your evidence of such authority until the trust patents are received by you."

Wadsworth filed the schedule with the Department of the Interior. He attached a certificate, among other things reciting "that the allotments shown hereon were made in accordance with the provisions of the act of Congress of February 8, 1887 as amended by the Act of June 25, 1910 and supplemented by the Act of March 2, 1917." The General Land Office recommended that the schedule be approved, with exceptions that appear to have no bearing on the case before us.

But the allotments appear never to have been approved by the Secretary. He refuses to issue patents to which these Indians claim to be entitled. The Government's moving papers contain an affidavit by counsel declaring that the Secretary disapproved the allotments. But it gives no reason, and no order or statement of disapproval by the Secretary is in the record. The Government filed no pleading averring reasons for disapproval or, if disapproval was formal, setting forth the document. On the contrary, counsel seems to have taken the position that as matter of law the Secretary's reasons and the form of his disapproval were not relevant to any question the Court is empowered to decide.

The power of the Secretary so to refuse patents and the powerlessness of the courts to review the refusal are here maintained on these contentions: "It rests in the complete discretion of the Secretary of the Interior whether or not allotments shall be made on the Palm Spring Reservation. Sections 4 and 5 of the Act of January 12, 1891 contemplate three steps in the making of allotments on that reservation: (1) an opinion by the Secretary as to the capacity of the Indians to receive allotments; (2) a method or procedure for making such allotments; and (3) approval of the allotments by the Secretary. Each of these steps is under the control and rests in the discretion of the Secretary." Upon these grounds the trial court and the Circuit Court of Appeals held that the plaintiffs in the *St. Marie* cases were not entitled to patents and that this petitioner is not entitled to go to trial.

I.

The Secretary's discretion in determining the capacity of the Indians to receive allotments.

The Act of 1891 provides that "whenever any of the Indians residing upon any reservation patented under the provisions of this Act shall, *in the opinion of the Secretary of the Interior*, be so advanced in civilization as to be capable of owning and managing land in severalty, the Secretary of the Interior may cause allotments to be made to such Indians." (Emphasis supplied.) This undoubtedly conferred a very considerable discretion upon the Secretary.

The Act of 1917, however, drops the language of discretion and *directs* the Secretary to cause allotments to be made to the Indians on the Mission reservations.[9] The Act was prepared by the Secretary[10] and if it was intended to perpetuate his discretion as to whether the allotment policy was to be applied to these Indians at all, it might easily have so provided. Both the Secretary and Congress appear to have settled that point. The communication of the Secretary to the Chairman of the Senate Committee on Indian Affairs indicates no reservations about the Secretary's view that the Indians were qualified and that the Department should carry out the allotment policy. It points out certain evils and inequalities among the Indians under the tribal system of land holdings and says, "This is a condition that cannot be cured entirely until the lands have been allotted in severalty." And again it says, "The Department believes that the present conditions, while much better than they were some years ago, would be rapidly improved by allotment in severalty, provided authority to pro rate the available land is given."

Following passage of the Act the Secretary set about executing its directions. Wadsworth was appointed General Allotment Agent

[9] The Act of 1917 in relevant part provides that: " . . . the Secretary of the Interior be, and he is hereby, authorized and directed to cause allotments to be made to the Indians belonging to and having tribal rights on the Mission Indian reservations in the State of California, in areas as provided in section seventeen of the Act of June twenty-fifth, nineteen hundred and ten (Thirty-sixth Statutes at Large, page eight hundred and fifty-nine), instead of as provided in section four of the Act of January twelfth, eighteen hundred and ninety-one (Twenty-sixth Statutes at Large, page seven hundred and thirteen); *Provided*, That this act shall not affect any allotments heretofore patented to these Indians." 39 Stat. 969, 976.

[10] See letter of Secretary of Interior to Chairman of Senate Committee on Indian Affairs, January 7, 1916.

and was sent to the Indians with instructions to permit them to select their own allotments. When he selected for those who did not choose for themselves, his schedule was disapproved, and only for that reason. He was returned to the task of compiling voluntary selections for those who desired allotments, it being thought that if that were done those who objected "would soon fall in line and request that they too be given their proportionate share of the allottable areas."[11] There is no denial that Wadsworth was authorized to hold out to the Indians that their patents would be received in a few weeks and that meanwhile, if not already living, on their selected lands, they might enter into possession.

To assume that the Act of 1917, while directing the Secretary to make allotments, only meant to give him uncontrolled discretion not to do so would be a doubtful construction, in view of its history. But even if it were so interpreted, it did not require the Secretary to manifest his exercise of discretion in any formal way. His opinion that the Indians had the capacity for individual responsibility for land ownership could be indicated by conduct as well as by words. We think his conduct and words amount both to an administrative construction of the 1917 Act as a direction and to the exercise of any discretion he may have had under it.

If the Indians were not ready for allotments, why send an agent to hold out to them that hope and promise? Why the elaborate procedure of allotment? The Department then sought not only to offer allotment but to proceed so as to make the Indians "fall in line." Despite the obvious inference from these acts the record does not counter them by any showing that the Secretary now considers these Indians to lack civilization and capacity, tested by the usual standards for allotment, nor does it show that they do not in fact possess it. History and common knowledge of these Indians would indicate that they are not wanting in whatever it is that makes up "civilization." Long ago the Franciscans converted them to Christianity, taught them to subsist by good husbandry and handicrafts. Under the Treaty of Guadalupe Hidalgo (1848) their ancestral lands and their governance passed from Mexico to the United States. During the gold discovery days they were too gentle to combat the ruthless pressures of the whites

[11] Letter of the Commissioner of Indian Affairs to the Secretary of the Interior, December 22, 1926.

and came to lead a precarious and pitiable, but peaceful, existence. Eventually the country was aroused by their plight and set up a commission to investigate their grievances and to make recommendations for their protection and relief. It reported in 1884[12] and its recommendations were substantially embodied in the Mission Indian Act of 1891. By the standards of peacefulness, industry, and gentleness these Indians have long been "civilized." Even tested by the standard of acquisitiveness, they seem not to have failed. Improvements made by Arenas on the lands he occupied in reliance upon his certificate are valued at $15,000.

On the record as it now stands we do not think the Government has established the falsity of the allegations of the complaint that the Secretary had made the preliminary decision as to the allotments. We think the issue has been settled, in the absence of further proof to the contrary, by the Act of 1917 and the Secretary's action under it.

II.

The Secretary's discretion as to procedure for making such allotments.

We do not see that this is much in question nor is much in point, if true. Arenas does not question that the Secretary had discretion to adopt the method of allotment which was followed. He claims that both he and the Department have complied with it, that his choice has been ascertained, the lands have been identified and marked and reported to the Department, and that nothing remains for either to do to perfect the right to a patent. If there has been any irregularity in the procedure to lead to a patent, the Government has not pleaded or evidenced it in the case. We assume the Secretary's complete control of the method and, as the record stands, that his method has been executed to the point where a patent would issue but for the refusal of the Secretary.

III.

The Secretary's discretion as to final approval of the allotments.

This is the crux of the lawsuit. It is as to this final step that Congress has invested the courts with some responsibility.

The Act of August 15, 1894, 25 U. S. C. §345, authorizes Indians to commence and prosecute actions "in relation to their right"

[12] S. Ex. Doc. No. 49, 48th Cong., 1st Sess., reproduced in Sen. Rep. No. 74, 50th Cong., 1st Sess.

to land under any allotment act or under any grant made by Congress "in the proper district court of the United States; and said district courts are given jurisdiction to try and determine any action, suit or proceeding arising within their respective jurisdictions involving the right of any person, in whole or in part of Indian blood or descent, to any allotment of land under any law or treaty." It is further provided that "the judgment or decree of any such court in favor of any claimant to an allotment of land shall have the same effect, when properly certified to the Secretary of Interior, as if such allotment had been allowed and approved by him."[13]

Under this statute the courts have decided disputes between Indians and the Government as to the relative qualifications of two claimants to receive, as a member of a band, a patent, *Hy-Yu-Tse-Mil-Kin* v. *Smith*, 194 U. S. 401, and whether particular lands were appropriate for allotment, *United States* v. *Payne*, 264 U. S. 446.

But here we do not know from any information developed in the adversary proceedings what the dispute between the Secretary of the Interior and Arenas is about. The Government did not answer the complaint. It foreclosed evidence on the facts by its motion for summary judgment, in which it incorporated the evidence in another proceeding. In that other proceeding no representative of the Government except the local Mission Indian agent and Wadsworth, the former allotment agent, were sworn. There appears to have been no testimony as to what happened to

[13] The statute in full is as follows:

"All persons who are in whole or in part of Indian blood or descent who are entitled to an allotment of land under any law of Congress, or who claim to be so entitled to land under any allotment Act or under any grant made by Congress, or who claim to have been unlawfully denied or excluded from any allotment or any parcel of land to which they claim to be lawfully entitled by virtue of any Act of Congress, may commence and prosecute or defend any action, suit, or proceeding in relation to their right thereto in the proper district court of the United States; and said district courts are given jurisdiction to try and determine any action, suit, or proceeding arising within their respective jurisdictions involving the right of any person, in whole or in part of Indian blood or descent, to any allotment of land under any law or treaty (and in said suit the parties thereto shall be claimant as plaintiff and the United States as party defendant); and the judgment or decree of any such court in favor of any claimant to an allotment of land shall have the same effect, when properly certified to the Secretary of the Interior, as if such allotment had been allowed and approved by him, but this provision shall not apply to any lands held August 15, 1894, by either of the Five Civilized Tribes, nor to any of the lands within the Quapaw Indian Agency: *Provided*, That the right of appeal shall be allowed to either party as in other cases."

the schedule of allotments after it reached Washington or as to whether it ever was approved or disapproved and, if so, how or by whom or why. The Government's affidavit filed in opposition to the motion recited that the Secretary's records "reveal that the Secretary of the Interior has disapproved the allotment schedule and certificates of selection." No entry order or memorandum of disapproval is produced, nor is the date thereof stated.

Certain facts do appear from which we know that this is no ordinary allotment problem. Each selection here included three kinds of land: a two-acre town lot, of considerable value; five acres of irrigable land of fair value; and forty acres of desert land. All of the town lots chosen are in Section 14, Township 4, South, Range 4, East. This section contains Palm Springs, a hot mineral spring, from which the reservation derives its name.

But the reservation itself is a checkerboard affair. At the time of its establishment the odd numbered sections already had been granted to the Southern Pacific Railroad and hence the reservation consisted of only even numbered sections. On the railroad sections the whites have established the settlement known as Palm Springs, a flourishing winter resort with large hotels and the usual business places and residences that characterize such a development. Out of this situation has grown conflict of interest between the Indians and the whites and between Indians themselves. The Indians, to the annoyance of the whites, seek to exploit their ownership of the springs, and the whites are accused, not without probable cause, of coveting the Indians' property rights therein. Those among both races who favor allotment allege that the denial of patents is designed to serve the white interests in Palm Springs by leasing or selling valuable tribal lands to those who are promoting the resort interests. Those who oppose issuance of patents allege that the allotment system is unfair to the tribe and will result eventually in the whites' getting possession and title to the lands. The outlines of the controversy are clear, but the summary disposition of the case has precluded the adversary trial which alone would give reliable foundation for determining it, if indeed the evidence will show that it should be the subject of judicial determination. The legal claims of this particular Indian to a patent for the lands he selected for allotment, which have long been in his possession and have been considerably improved with the knowledge of the Government, are now entangled in larger questions of Indian land policy.

The jurisdictional Act of 1894, under which this suit is in the courts, requires them to adjudicate legal rights of the parties and to render a judgment which will stand in lieu of the Secretary's action if he has *unlawfully denied* a patent to an allotment to which the Indian is entitled. But courts are not to determine questions of Indian land policy, nor can the Secretary on grounds of policy deprive an allottee of any rights he may have acquired in his allotment. To separate questions of right from questions of policy requires judicial examination of any well pleaded allegation of the complaint and of any grounds advanced for refusal of the patent. Even in some discretionary matters, it has been held that if an official acts solely on grounds which misapprehend the legal rights of the parties, an otherwise unreviewable discretion may become subject to correction. *Perkins* v. *Elg*, 307 U. S. 325, 349.

Since the government has not pleaded to the complaint nor offered evidence as to the Secretary's position we know it only as stated in argument. It appears that the sole reason for denying a patent is a departmental change of policy, by which the Secretary now disagrees with the allotment policy prescribed for these Indians by the Acts of 1891 and 1917. The Government brief says, "Meanwhile opposition to the making of allotments in severalty developed among the members of the Palm Springs band of Indians, and as a result administrative action on the 1927 schedule was further delayed. During this period the conclusion was reached in the Department that in fairness to the band as a whole and from the standpoint of their best interests the lands scheduled for allotment should be held in a tribal status and dealt with as a tribal asset." It says further, "The Secretary has determined that it would be inequitable and detrimental to the Palm Springs band of Indians as a whole to approve any allotments on their reservation." Again, "The Secretary should not be compelled to carry through a plan of allotment in severalty which in his judgment will operate contrary to the best interests of the Palm Springs band of Indians, but he should be permitted to stay his hand and seek a time which would be more in the interests of that band."

The Secretary has endeavored to persuade Congress that treatment other than the allotment policy embodied in its legislation would be more advantageous for the Indians. In 1935, he recommended to Congress a bill authorizing him to make a 99-year lease

of the reservation lands.[14] This failed of enactment. In 1937, the Secretary recommended a bill to repeal the provisions of the Act of March 2, 1917, directing the making of allotments on the Mission Indian reservations.[15] That bill failed. He also recommended a bill to authorize the sale of a part of the Palm Springs Reservation.[16] That likewise failed of enactment.

We think the grounds advanced by the Government by way of argument, although not by way of evidence, are inadequate to establish as matter of law that the petitioner has no legal right to a patent. Congress not only has failed to deny these allotment rights by legislation, but has rejected urgent and reiterated appeals from the Department to do so. Arenas is entitled to invoke the applicable legislation as it stands in determining whether he is entitled to have completed the all but fully executed policy of allotment.[17]

The petitioner made no counter motion in the District Court for summary judgment against the Government. Before us he asks only that his complaint be answered and that he be given a chance to establish his legal claim if he can by trial. The summary judgment against him should be reversed and the Government required to answer. We do not preclude motion by the Government to strike parts of the complaint if any are found to be improper pleading. But we think the duty of the Court under the jurisdictional act can be discharged in a case of this complexity only by trial, findings and judgment in regular course.

Reversed.

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[14] See H. R. Rep. No. 1521 and Sen. Rep. No. 1291, 74th Cong., 1st Sess.

[15] Sen. Rep. No. 1238, 75th Cong., 1st Sess. The Palm Springs Indians were among those which had voted against application to them of the Indian Reorganization Act of 1934, 48 Stat. 984, which would have terminated all future allotment in severalty.

[16] Hearings, House Committee on Indian Affairs, on H. R. 7450, 75th Cong., 3d Sess., pp. 5-6.

[17] The Solicitor of the Department of Interior has himself indicated that where the Indian has done all he could to get his patent, and has failed because of the neglect of public officers the courts will generally protect him, and that this may be proper even where there has been a failure to approve the allotment. See 55 Decisions of the Department of the Interior 295, 303-304.